

**THE COPYRIGHT CONSUMERS' BARGAIN
DEFINING THE RIGHTS TO COMMERCIAL COPIES OF
COPYRIGHT WORKS**

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Abstract

This thesis aims at defining, both legally and normatively, the nature and scope of consumers' rights to commercial copies of copyright works as an essential means to preserve the coherence and legitimacy of copyright. It explores the interaction between: (1) technological developments, which empower consumers to experience copyright works in unprecedented ways, but also augment copyright holders' control over access to and use of their works; (2) the progressive expansion in scope of copyright holders' exclusive rights as conferred by copyright law; and (3) the contract terms and technological protection measures under which copyright works are made available to consumers. The nature and scope of consumers' rights to commercial copies of copyright works are defined by applying property law and theory, in particular, through an analysis of the concepts of ownership, property limitations and the *numerus clausus* principle. The nature and scope of consumers' rights to commercial copies of copyright works are also analyzed through the application of consumer protection law and theory. The thesis explores the use of consumer law concepts such as implied obligations of quality, fitness for purpose, title, quiet possession, information disclosure requirements and prohibitions of unfair practices to assert claims against restrictions on uses of commercial copies of copyright works. Commercial copies of copyright works emerge as a peculiar form of personal property, the rights in which are determined to a large extent by the exceptions to copyright infringement laid out in Canada's *Copyright Act* or similar statutes in other jurisdictions, and by the commercial transactions through which consumers access copyright works. Consumers' ownership rights to commercial copies of copyright works are progressively eroding. The thesis provides various recommendations to clarify and strengthen consumers' rights to commercial copies of copyright works on the basis of the *prima facie* normative force of ownership freedoms and the instrumental justifications of copyright to incent the creation and the dissemination of copyright works.

Pour ma mère Florence, et en la mémoire de mon père Benoît.

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Chapter 1
Introduction
The Copyright Consumers' Bargain

I. Preliminaries

We are all copyright consumers. On a daily basis and for different purposes, we access works that are protected by copyright, in an unprecedented volume. The variety of ways through which we access copyright works continues to increase and evolve. We browse the Internet for work, entertainment, or instructive purposes. We download music, films, e-books, or applications for our smart phones. We purchase or rent film DVDs, books, video games, or computer programs. We use streaming services to watch a movie online or through our on-demand TV service provider. We store the copies of copyright works we own on our computer or through an Internet storage service. The variety of ways in which we are enjoying works protected by copyright is also multiplying: we make copies for time, place, device-shifting, or backup purposes; we share copies of copyright works with friends online, we post links of our favourite songs, YouTube clips, or news article on Face book, and we incorporate existing music and videos into home creations that we post online. Evolving technologies empower us to consume more copyright works in ever changing ways and make us increasingly dependent on them in our insatiable desire to stay uninterruptedly connected to the world.

While modern citizens interact with copyright works on a daily basis, the rights they have to them are often less than clear. What is more certain is that the scope of the exclusive rights of copyright holders has been expanding continuously, including through increased enforcement powers against individual users who make unauthorized uses of copyright works. What is the copyright consumers' bargain as the scope of copyright progressively increases and as the commercial offerings and possible uses of commercial copies of copyright works continue to evolve?

The primary objective of my thesis is to define and substantiate copyright consumers' rights to commercial copies of copyright works to provide a better understanding of the

transformation of the copyright consumers' bargain that is currently taking place. As I will argue in my thesis, defining and substantiating consumers' rights to commercial copies of copyright works begins with an understanding of what consumers own, as the baseline to situate other forms of legal relationships that involve copyright works. Defining consumers' rights to commercial copies of copyright works also requires an understanding of the nature and scope of exceptions to copyright infringement under *Canada's Copyright Act [CCA]*¹ (or similar statutes in other jurisdictions). Although exceptions to copyright infringement or so-called users' rights impact on the scope of consumers' ownership rights to commercial copies of copyright works, they are two distinct concepts.²

Property, copyright, sale of goods, and consumer law and theory offer a broad and rich perspective on how the law currently regulates commercial copies of copyright works and information products. It enables us to identify common regulatory trends and deficiencies and to look for solutions that transcend the various fields of the law. The ultimate goal of my inquiry is to search for more coherence with respect to the regulation of copyright users' rights in the context of conflicting values and interests and the pressures brought on by the digital environment. Why and how do we incentivize and protect creativity and innovation and for the benefit of whom? Under what rules of engagement do we want to make the fruits of creativity and innovation available to users?

A better understanding and more coherent definition of copyright consumers' rights brings many benefits in addition to addressing the immediate interests of copyright consumers. As I will argue throughout my thesis, the future and legitimacy of the *copyright house* depends to a large extent on better defining copyright users' rights. The metaphor of the copyright house renovation project that I apply in my thesis emphasizes the strong property theory foundations of my work. The copyright house metaphor also alludes to the progressive expansion of copyright in scope, as accelerated in the last decades, adding building blocks to strengthen copyright holders' exclusive rights to their works. Finally, the metaphor is conducive to situating the current location of users, i.e., *outside* the copyright house. One of

¹ RSC 1985, c. C-42.

² See the discussion on exceptions to copyright infringement in the *CCA*, *supra* note 1, in Chapter 3 Part II, and see the discussion on the nature and scope of ownership rights in commercial copies of copyright works in Chapter 6 Part II.

the objectives of my thesis is to demonstrate why and how we need to bring users *into* the copyright house, alongside authors, copyright holders, parties with other vested interests and the public.

My research on the contribution of property, copyright, sale of goods, and consumer law and theory to better understand and define copyright users' rights, enables the filling of important gaps in the current literature on copyright users and information products. First, the legal nature of commercial copies of copyright works, as well as the theoretical justifications and normative considerations that surround the right to own commercial copies of copyright works (Chapter 6, building upon Chapter 4 and Chapter 5), are relatively underexplored. Approaching users' rights from the perspective of property, including through the theory of property limitations to mediate between the competing rights of copyright holders and users in the copyright works (Chapter 7), contributes to the copyright user literature by providing a novel approach to justify and clarify the scope of copyright users' rights. Second, the research conducted on the concepts of tangibility, goods, services, sales, and licences (Chapter 8) allows me to make important links across property, copyright, sale of goods and consumer law that have been little explored so far. My research underscores the pivotal function of these concepts to the remedies copyright consumers have in consumer law, to consumers' ability to invoke the exhaustion or first sale doctrine in copyright law, and to determine which exclusive rights of copyright holders are involved in a commercial transaction. Third, the framework that I propose through different scenarios for the application of consumer protection law obligations to commercial copies of copyright work (Chapter 11, building upon Chapter 9 and Chapter 10) shows the potential and also important structural limitations of the relatively little-explored interaction between consumer law and copyright law. Overall, the research that I conducted in property, copyright, sale of goods and consumer law and theory advances the knowledge and understanding of the relationship between copyright holders and end-users, an area where there is increased pressure to properly balance competing interests.

II. Particulars

In Canada and the other jurisdictions examined here,³ copyright has progressively expanded throughout the last century in duration, in subject matter, and in scope (Chapter 5).⁴ The continuous expansion of copyright often resulted from Canada's willingness and commitment to comply with international copyright law conventions that have followed the same expansionist trajectory.⁵ After three previous failed attempts at legislative reform, the *CCA* was amended significantly in 2012⁶ to comply with Canada's proposed assumption of international obligations under the *World Intellectual Property Organization Internet Treaties* of 1996 [*WIPO Internet Treaties*].⁷ The amendments to the *CCA* include the exclusive right of copyright holders to control how their works are made available, including on the Internet,⁸ the extension of the term of protection of performers' performance and sound recordings,⁹ and the introduction of provisions dealing with technological protection measures [TPMs].¹⁰ The TPM provisions create separate acts of infringement for the circumvention of TPMs put in place by copyright holders.¹¹ The 2012

³ I.e., the US, the European Union, the UK, and France. I discuss the reasons that justify this choice further below in Part III of this chapter.

⁴ In Chapter 5 Part II, I summarize the main changes that have been made to copyright in Canada in the last century, leading to its continued expansion.

⁵ In Chapter 5 Part II, I summarize the main international copyright conventions and how they relate to the evolution of copyright law in Canada.

⁶ Before Bill C-11, *An Act to Amend the Copyright Act*, 1st Sess, 41th Parl, 2011 (assented to June 29, 2012) leading to the entry into force of the *Copyright Modernization Act*, S.C. 2012, c. 20, three previous bills were introduced to amend the *CCA*, *supra* note 1, to address the various issues brought on by the digitization of copyright works, i.e.: Bill C-32, *An Act to amend the Copyright Act*, 3rd Session, 40th Parl., 2010 (1st reading June 2, 2010); Bill C-61, *An Act to Amend the Copyright Act*, 2nd Sess, 39th Parl, 2008 (first reading 12 June 2008); Bill C-60, *An Act to Amend the Copyright Act*, 1st Sess, 38th Parl, 2005 (first reading 20 June 2005).

⁷ *WIPO Copyright Treaty*, 20 December 1996, WO033EN, online: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P8_189 [*WCT*]; *WIPO Performances and Phonograms Treaty*, 20 December 1996, WO034EN, online: http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html [*WPPT*]. The main purpose of the treaties is to address "the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works." *WCT*, *ibid*, preamble.

⁸ *CCA*, *supra* note 1, s 2.4 (1.1).

⁹ *Ibid*, s 23 (1), (1.1).

¹⁰ *Ibid*, ss 41-41.21. I discuss the scope and issues around the newly introduced TPMs in Chapter 3 Part III B.

¹¹ *Ibid*.

amendments to the *CCA* also include new exceptions to copyright infringement that I will discuss in Chapter 3.¹²

The latest manifestations of the increased protection of intellectual property (in particular copyright) at the international and national levels impact more specifically online service providers and online users of copyright works by providing additional enforcement powers to copyright holders in the digital environment. The French law of 2009 [*HADOPI*],¹³ the UK *Digital Economy Act 2010*,¹⁴ and the signature of the *Anti-Counterfeiting Trade Agreement* in 2011 [*ACTA*]¹⁵ illustrate this new wave of regulation to strengthen the means by which copyright holders can enforce their exclusive rights and deter copyright infringement.¹⁶ Attempts in the US to introduce similar laws have met fierce resistance from intermediaries and from members of the public, one culminating point being the complete blackout of Wikipedia for one day in January 2012.¹⁷ The Bill introduced by the US House of Representatives, *Stop Online Piracy Act* [*SOPA*],¹⁸ and the Bill introduced by the US Senate, *Protect Intellectual Property Act* [*PIPA*],¹⁹ were subsequently abandoned.²⁰ In Canada, *Bill C-56*²¹ was introduced in 2013 and, if adopted, will further amend the *CCA* by strengthening the civil and criminal remedies for copyright infringement.²² At the

¹² See the discussion in Chapter 3 Part II D.

¹³ *LOI n° 2009-669 du 12 juin 2009* JORF n°0135 13 June 2009, 9666. “HADOPI” stands for “Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet” (High Authority for the distribution of works and the protection of rights on the Internet).

¹⁴ (UK), c. 24.

¹⁵ October 1, 2011, online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/intellect_property.aspx?view=d ACTA’s signatory members include Canada, the EU and its member states, the US, Japan, and Australia.

¹⁶ *Ibid*; *HADOPI*, *supra* note 13; *Digital Economy Act 2010* (UK), *supra* note 14. For a discussion on the procedural adoption and substantive issues around *ACTA*, see Peter K. Yu, “Six Secret (and now open) Fears of Acta” (2011) 64 *SMU L. Rev.* 975.

¹⁷ Amy Goodman, “The SOPA blackout protest makes history,” January 18, 2012, *The Guardian*, online: <http://www.guardian.co.uk/commentisfree/cifamerica/2012/jan/18/sopa-blackout-protest-makes-history>

¹⁸ US, Bill HR 3261, *Stop Online Piracy Act*, 112th Cong, 2011.

¹⁹ US Bill S 968, *Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011*, 112th Cong.

²⁰ Jonathan Weisman, “After an Online Firestorm, Congress Shelves Antipiracy Bills”, January 20, 2012, *NYTimes*; Stephanie Condon, “PIPA, SOPA put on hold in wake of protests” January 20, 2012, *CBS News*.

²¹ *An Act to amend the Copyright Act and the Trade-marks Act and to make consequential amendments to other Acts*, 1st Session, 41st Parl, 2013, (first reading, March 1, 2013).

²² *Ibid*, cl. 3-5.

international level, the future of *ACTA* is uncertain. In July 2012, in an unprecedented move, the European Parliament formally rejected the ratification of *ACTA* by the EU.²³ The eventual ratification of *ACTA* by the EU and its Member States had given rise to broad opposition across Europe, the main fear being its limitations on Internet freedom.²⁴

The progressive increase of the protection of copyright holders' exclusive rights at the international and national levels confirms two related phenomena. First, copyright holders throughout the world have been successful at coordinating, articulating, and advancing their interests.²⁵ Second, governments, legislative bodies, and international organizations worldwide have responded to copyright holders' concerns by progressively expanding the scope of copyright in international instruments and in national laws.²⁶ Similar and successful coordination, articulation, and advancement of the interests of copyright users are not as apparent.

The continuous increase in copyright holders' exclusive rights and protection occurs at the expense of copyright users' rights and interests. Legislative reforms that have brought on this increase often overlook and trivialize copyright users' rights and interests (Chapter 2, Chapter 3).²⁷ Failure to adequately take into account copyright users' rights and interests risks undermining copyright's coherence, credibility, and ultimately its legitimacy.²⁸ The recent massive public response against *ACTA* and its implementation in the US and in the EU may illustrate that governments, legislative bodies, and international organizations have

²³ Charles Arthur, "Anti-piracy agreement rejected by European Parliament, but Acta could be revived by European Commission" 4 July 2012, *The Guardian*, online: <http://www.guardian.co.uk/technology/2012/jul/04/acta-european-parliament-votes-against>.

²⁴ *Ibid.* On how European copyright consumers are becoming increasingly organized, see: Antonina Bakardjieva Engelbrekt, "Accommodating the interests of the copyright consumer: New institutional dynamics in the wake of the infosoc directive" in Antonina Bakardjieva Engelbrekt, Ulf Bernitz, Bengt Domeij, Annette Kur & Jonas Nordell, eds, *Särtryck ur Festskrift till Marianne Levin* (Norstedts Juridik: 2008) where the author applies institutional choice theory to demonstrate the increased involvement of consumer groups in Europe in the legislative process of copyright and consumer law reforms and before the courts.

²⁵ See the discussion in Chapter 3 Part III B and Part V.

²⁶ See the discussion on the progressive expansion of copyright in Chapter 5 Part II, and reference in Part II of this chapter to *ACTA*, *supra* note 15, *HADOPI*, *supra* note 13, *Digital Economy Act 2010* (UK), *supra* note 14.

²⁷ See the discussion in Chapter 2 Part II on the place of users in copyright law, and in Chapter 3 Part II, III & IV.

²⁸ See the discussion in Chapter 2 Part III.

reached that point.²⁹ It also shows that copyright users and other actors supporting their interests are getting more organized and are becoming more efficient at advancing the rights and interests of users.³⁰ Defining the legal and normative boundaries to copyright users' rights is the approach that I pursue here to advance the rights and interests of users. This approach also aims to provide greater consistency in the law.

As I define copyright users' rights, I look at one specific category of users: *copyright consumers*, i.e., individuals who conclude a commercial transaction with copyright holders or their distributors for personal purposes.³¹ The first reason that motivated that choice when I started my research was the need to explore a relatively under-theorized area of law, i.e., how consumer protection, as a body of law, can offer arguments to counterbalance the copyright holder-centric nature of copyright law and help ascertain copyright users' rights to commercial copies of copyright works. Another reason for focusing on copyright consumers among the larger community of users is that it brings us to the heart of one of the most pressing challenges in contemporary copyright law: the effects that the increasing use of non-negotiated standard end-user agreements have on copyright law and its underlying objectives.³² Last but not least, the study of the specificity of copyright consumers among the larger community of users brings out important distinctions between their interests and the ones of other users.³³ This enables a more refined approach to the promotion of copyright consumers' rights while offering points of comparison with the other copyright users.³⁴

The lack of clarity of consumers' rights to commercial copies of copyright works flows to a large extent from the unique regime that the *CCA* (as well as similar statutes in other jurisdictions) creates: it confers exclusive rights on copyright holders to protect their literary

²⁹ See the discussion above in this chapter on *ACTA*, *supra* note 15, *SOPA*, *supra* note 18 and *PIPA*, *supra* note 19.

³⁰ *Ibid.* See also Englebrekt, *supra* note 24.

³¹ I discuss the specificity of copyright consumers in comparison to other copyright users in Chapter 2 Part IV.

³² See in particular the discussion in Chapter 3 Part III.

³³ See the discussion in Chapter 2 Part IV.

³⁴ *Ibid.*

and artistic works for a limited duration.³⁵ The main purpose of the *CCA* is to define copyright holders' exclusive rights, as well as to provide the remedies for copyright infringement. While the *CCA* includes exceptions to the exclusive rights of copyright holders for the benefit of users, it offers little enlightenment on the nature and scope of copyright users' rights. The *CCA* is primarily copyright holder-centric.³⁶ The commercialization of copyright works through non-negotiated standard end-user agreements and their interaction with copyright holders' exclusive rights as conferred by the *CCA* add another layer of complexity when defining the nature and scope of copyright users' rights.³⁷

The disembodiment of commercial copies of copyright works from a physical object, as well as the panoply of means through which they are made accessible, force us to reconsider traditional concepts in law when defining the nature of copyright users' rights: are the copyright works accessed as goods, services, or as a *sui generis* product?³⁸ Did a sale, a licence, or both take place?³⁹ When can the commercial copies be owned? When and how are copyright holders' exclusive rights involved in the distribution of their works online, e.g., reproductions, communications to the public by telecommunication?

The future and legitimacy of the copyright house depends in great part on adequately delineating copyright users' rights. In that context, defining the rights of copyright consumers as a large group within copyright users, is particularly important for at least three reasons. First, to define copyright consumers' rights requires consideration of the role of copyright users in furthering the objectives of copyright.⁴⁰ I will argue that giving more consideration to users' rights increasingly needs to form an integral part of the objectives of copyright law.⁴¹ Based on the assumption that users play a central role in furthering the objectives of copyright law, clearly setting the scope of users' rights will determine how

³⁵ In Canada, the *CCA*, *supra* note 1 confers exclusive rights to the authors and copyright holders with respect works of authorship as they are defined.

³⁶ See the discussion in Chapter 2 on the place of copyright users in the *CCA*, *supra* note 1 and in the copyright statutes of other jurisdictions.

³⁷ See the discussion in Chapter 3 Part III.

³⁸ See the discussion in Chapter 8 Part II A and B.

³⁹ See the discussion in Chapter 8 Part II C.

⁴⁰ See the discussion in Chapter 2 Part II and Part III and Chapter 6 Part III.

⁴¹ *Ibid.*

business intermediaries will support users and the goals of copyright even further. Business intermediaries can only support and enhance users' rights to the extent that they are reasonably clear. One recent example is the start-up company ReDigi.⁴² The company put in place a Web interface platform for the resale of lawfully purchased copies of digital music.⁴³ ReDigi started offering the service on the premise that users were allowed to resell the digital copies that they had lawfully acquired as a result of the application of the exhaustion or first sale doctrine. Under this doctrine, copyright holders' exclusive distribution rights are exhausted after the lawful first sale of copies of their works.⁴⁴ The application of the first sale doctrine to copies of copyright works distributed online without a supporting physical medium is an unsettled area of the law.⁴⁵ Less than one year into ReDigi's operations, a legal action was launched by Capitol Records against ReDigi and partial summary judgment was recently granted in favour of Capitol Records on the basis that ReDigi's service infringed Capitol Records copyrights and that the first sale doctrine did not apply to the digital copies of musical recordings resold through ReDigi's platform.⁴⁶ The example of ReDigi is one among several other examples that illustrate the practical significance of defining the appropriate scope of copyright users' rights at a legal and normative level.

Second, the rights that consumers have to commercial copies of copyright works are becoming a moving target. Through specific applications of property, copyright, and consumer protection law, my research work emphasizes various trends toward a decrease in scope of copyright consumers' rights to commercial copies of copyright works. The progressive expansion of copyright increases copyright holders' powers to restrict and control how copyright consumers enjoy commercial copies of copyright works and to expand powers and control further through TPMs and non-negotiated standard end-user

⁴² See the ReDigi official website at: <https://www.redigi.com>.

⁴³ *Ibid.*

⁴⁴ See the discussion on the application of the first sale doctrine in Chapter 3 Part II F.

⁴⁵ *Ibid.*

⁴⁶ See *Capitol Records LLC v Redigi Inc.*, US SDNY (2012), motion for preliminary injunction by Capitol Records was denied. Capitol partial summary judgment granted: *Capitol Records, LLC v ReDigi Inc.*, 2013 WL 1286134 (SDNY) on the basis that ReDigi infringed the copyrights of Capitol Records, i.e., their exclusive reproduction and distribution rights. The Court held that as the first sale doctrine was no available defence to ReDigi as it only limits copyright holders' distribution rights and not their reproduction rights which the Court found were infringed by ReDigi. I discuss the nature and scope of the exhaustion or first sale doctrine in Chapter 3 Part II F.

agreements.⁴⁷ In recent years, copyright holders have enforced their rights directly against consumers.⁴⁸ Recent international developments and national legislative reforms confer to copyright holders even greater enforcement powers against consumers.⁴⁹

By contrast to the trend toward a decrease in scope of copyright consumers' rights to commercial copies of copyright works, consumers' expectations of uses continue to increase. New technologies and networks empower consumers and other users in unprecedented ways.⁵⁰ This further exacerbates the tension between copyright holders and copyright users. The heated debates around Canadian copyright reform in the last twenty years and around the world attest to that increasing tension.⁵¹ One of the main goals of my thesis is, to substantiate both legally and normatively what legitimate claims consumers should have with respect to copyright works. On the one hand, copyright consumers have high expectations and growing desires for more uses of copyright works brought on by ever more empowering technologies. On the other hand, copyright holders pursue their efforts toward increased protection of their works based on the threats that the same empowering technologies pose to their subsistence by enabling massive copyright infringement. How do we mediate between these competing interests? Is there a hierarchy between the rights of copyright holders and the rights of copyright consumers, as copyright reforms of the last decades have led us to believe, or should not copyright consumers' rights be seen as equally deserving competing rights?

⁴⁷ See the discussion in Chapter 3 Part III and in Chapter 5 Part II.

⁴⁸ This is particularly true in the music industry. In recent years, lawsuits against consumers have made headlines, including the highly publicized legal actions by corporations in the music industry, including Sony BMG Music Entertainment against Joel Tenenbaum, a university student, for the illegal download and distribution of music on the Internet through peer-to-peer file sharing networks. Tenenbaum received the assistance of a Harvard law professor Charles Nesson and Harvard law students to prepare his defence. See: "Joel Fights Back.com," online: <http://joelfightsback.com/2012/09/myth-and-facts-the-latest-update-in-joels-case/>. A recent development in that case is: *Sony BMG Music Entertainment v. Tenenbaum*, 2012 WL 3639053 (D.Mass.), 2012 Copr.L.Dec. P 30,306, 103 U.S.P.Q.2d 1902, where the US District Court (Massachusetts) upheld the damages of \$675,000 previously awarded for the plaintiffs against Tenenbaum. For a review of legal actions by copyright holders against consumers, see: Matthew Rimmer, *Digital Copyright and the Consumer Revolution – Hands off My iPod* (Cheltenham, UK: Edward Elgar Publishing Ltd, 2007).

⁴⁹ See the discussion above in Part II of this chapter on the recent signature of *ACTA*, *supra* note 15, and on related recent legislative reform in France, the UK, the US, and recently Canada.

⁵⁰ See Part I of this chapter.

⁵¹ See in particular Chapter 3 Part III B.

Third, consumers, and in particular copyright consumers, are more vulnerable individually and as a group than copyright holders. Consumers are generally less organized and less well represented in any legislative reform process than private industry corporations and associations, even though various initiatives in the context of the recent Canadian copyright reform show that efforts are being made to improve their representation.⁵² At an individual level, consumers are more vulnerable than sellers and suppliers as a result of asymmetries in information, bargaining power, and their ability and resources to remedy an unfair bargain.⁵³ In addition, particular attention needs to be devoted to copyright consumers as part of the larger group of consumers. Access to and enjoyment of copyright works touch upon fundamental values that modern societies generally promote: access to knowledge, education, creativity, innovation, and freedom of expression.⁵⁴ These are some of the values that are frequently invoked to justify the existence of the exclusive rights that copyright confers.⁵⁵ Any restrictions imposed on copyright consumers that can impede the promotion and flourishing of these core values make copyright consumers particularly vulnerable and should be of concern to law and policy-makers.⁵⁶

Throughout my thesis, I will argue that defining and substantiating consumers' rights to commercial copies of copyright works begins with understanding what they own. Given the intricacy of consumers' copy ownership rights and copyright holders' exclusive rights in the works, I approach this relationship through the concept of property limitations developed by James W. Harris.⁵⁷ The legal and normative analysis of copy ownership is the starting point for understanding what copyright consumers are sacrificing through the progressively

⁵² On the dangers of legislative reform capture by powerful interests particularly in the area of copyright, see Ian Hargreaves, "Digital Opportunity, a review of intellectual property and growth" 2011, at 93 (para 10.9ff). On the lack of involvement of the public in intellectual property matters see: David Vaver, *Intellectual Property Law Copyright, Patents, Trade-Marks*, 2d ed. (Toronto: Irwin Law, 2011) at 680-681. In Canada, a wide public consultation on copyright reform was initiated by the Government of Canada as part of recent copyright reform. See: <http://www.ic.gc.ca/eic/site/008.nsf/eng/home>. On how European copyright consumers are becoming increasingly organized see Engelbrekt, *supra* note 24.

⁵³ See the discussion on the theoretical justifications of consumer protection obligations in Chapter 10.

⁵⁴ See the discussion in Chapter 6 Part III.

⁵⁵ *Ibid.*

⁵⁶ See the discussion in Chapter 2 Part II and in Chapter 6 Part III.

⁵⁷ James W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996). See the discussion in Chapter 4 Part V and in Chapter 7.

increasing scope of copyright protection in contrast to the unprecedented empowerment by the multiple possible uses of copyright works.⁵⁸

To approach copyright consumers' rights through the concept of property and ownership and, more particularly, to look at their interdependence with the exclusive rights of copyright holders through the concept of property limitations, may appear paradoxical and even counterintuitive. When I started my research, my main objective was to see how consumer law and theory could help substantiate consumers' rights to commercial copies of copyright works. I quickly came to realize that to achieve this goal successfully, it was essential to develop a better understanding of the nature of the property and ownership rights that consumers have in commercial copies of copyright works. This forced me to look at the property attributes of copyright, which in turn led me to the heart of an ongoing debate about the rapprochements made between copyright and property.⁵⁹ While many scholars associate the nature of copyright with a form of property, other scholars point to the misfits between copyright and property.⁶⁰ Among the latter group, there are commentators who argue that the property rhetoric around copyright is one of the main causes for its progressive expansion.⁶¹ Particularly from that perspective, substantiating copyright consumers' rights through property law and theory may appear to be paradoxical. I will argue how, on the contrary, property law and theory provide adequate tools and insights to understand the nature, scope, and limitations of copyright consumers' rights to commercial copies of copyright works, as well as of copyright holders' exclusive rights in copyright works.

The increasing dematerialization of copyright works (i.e., the absence of a physical object embodiment of the works, e.g., a book, DVD, or CD) and the myriad offerings through which copyright works are made available without involving the transfer of ownership of commercial copies to copyright consumers may make the application of property law and theory appear at first blush to be ill-suited to, perhaps even out of place with, the current

⁵⁸ See the discussion in Chapter 4 Part II, Chapter 6 Part II and Chapter 7.

⁵⁹ See Chapter 5, in particular Part III, IV, V.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

environment.⁶² I will demonstrate how, on the contrary, concepts of property and ownership are still highly relevant, particularly so when new technologies continue to challenge the law as a result of the loss of familiar points of reference.⁶³

Approaching consumers' rights through property and ownership departs from the more common avenue that copyright scholars have so far taken by looking at consumers' rights through copyright policy arguments.⁶⁴ While policy arguments can successfully support copyright consumers' rights, I will argue that a property law and theory approach to copyright consumers' rights can be supported by policy arguments and make them even stronger. It offers a solid anchor and point of departure from which to look at copyright consumers' rights to commercial copies of copyright works.

Common wisdom dictates that users who enter into a commercial transaction with copyright holders (or their distributors) should be at least in as good a position as other users who access the same copyright works without a contract. As the primary successful argument invoked to strengthen the scope of copyright holders' exclusive rights has been to counter copyright piracy, one would assume that copyright holders would want to encourage lawful consumption of their works and design the commercial transaction as an incentive to achieve that goal. Defining copyright consumers' rights through property, copyright, and consumer (contract) law and theory allows the exploration of these questions: What is copyright consumers' bargain? Are consumers better off than other users who access copyright works without a commercial transaction?

III. Scope of research and definitions

The focus of my thesis is Canadian copyright law and consumer (contract) law as situated in a global context. Therefore, I refer to international conventions and other instruments when they are relevant to contextualize the law.⁶⁵ I also look at jurisdictions that have a particular affinity with Canada, either for historical reasons or because the laws in those

⁶² See the discussion in Chapter 8, in particular Part II and Part IV.

⁶³ *Ibid.*

⁶⁴ See the discussion in Chapter 2 Part II and IV and in Chapter 6 Part III.

⁶⁵ See in particular the discussion in Chapter 3 Part III B and Part V. The research that I conducted for my thesis is current as of April 15, 2013.

jurisdictions have provided guidance in the past to our federal and provincial governments, legislative bodies, and courts i.e., the US, the EU, the UK, and France. The framework of property law and theory that I apply here is based on the common law tradition of property with linkages to the civil law tradition, and refers to dominant philosophical and economic theory movements to support the existence and scope of copyright and of copy ownership. I occasionally refer to political theory to explain certain trends of copyright legal reform in Canada and worldwide,⁶⁶ and to behavioural law and economic theories in the consumer (contract) law analysis portion of my thesis. I develop legal and normative arguments toward substantiating copyright consumers' rights to commercial copies of copyright work.

In defining copyright consumers' rights, I do not provide a detailed analysis of competition or antitrust law. I refer to this body of law occasionally to contextualize a copyright or consumer (contract) law doctrine, to justify at the normative level the scope of copyright and copy ownership, or to situate exigencies that are specific to the EU single market.⁶⁷ I also do not specifically look at consumers' rights under privacy law but I discuss privacy issues, including in my property theory analysis of various justifications to support the scope of copy ownership.⁶⁸ Research from other disciplines, including anthropological and sociological studies on copyright consumers, could enrich the arguments that I present here and inform the law even further. For instance, they could provide additional insights and understanding into consumers' reasonable expectations with respect to commercial copies of copyright works. For reasons of scope, I do not include this area of research in my thesis.

Throughout my thesis I refer to *copyright works* as those works that are protected by copyright under the *CCA* or similar statutes in other jurisdictions, as the context may dictate.⁶⁹ My research focuses on specific works protected by copyright: e-books, musical

⁶⁶ *Ibid.*

⁶⁷ See the discussion in Chapter 3 Part III A, in Chapter 7 Part III A (ii) and Chapter 8 Part III and IV.

⁶⁸ See in particular the discussion in Chapter 6 Part III.

⁶⁹ *CCA*, *supra* note 1, s 5(1) provides: "copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work." "Every original literary, dramatic, musical and artistic work" is defined as including: "every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography,

recordings, and films distributed online. I often refer to such works distributed in the form of CDs, DVDs, or books as material objects so as to make important parallels and distinctions.⁷⁰ I focus my research on those specific copyright works to look at the various issues that revolve around the transformation of the media through which they are distributed, from a tangible physical object to an immaterial copy.⁷¹ The analysis and arguments that I make throughout my thesis also apply to commercial copies of video games and of computer programs and could apply to other forms of commercial copies of copyright works in consumer transactions.⁷² In particular, the commercialization of computer programs has given rise to an important body of case law and commentaries as an earlier form of mass-market commercialization of copyright works with non-negotiated standard end-user agreements.⁷³

The concept of *commercial copies of copyright works* refers to those products that are the object of a legal transaction between consumers and copyright holders (or their distributors), as a means to distinguish such products from copies of copyright works made by persons in possession of copyright works (which may or may not be lawful reproductions of the copyright works). *Copy ownership* emphasizes the legal relationship that consumers have with *commercial copies of copyright works*.

topography, architecture or science”: *ibid*, s 2, which also defines “Literary work”, “dramatic work”, “musical work” and “artistic work.”

⁷⁰ Books are protected as “literary works”; musical recordings typically embed “musical works”, “sound recordings” “performers’ performance”, all of which are subject matter protected by copyright; films, or “cinematographic works” are protected as “dramatic works”: *CCA, supra* note 1, s 2. See my survey of online non-negotiated standard end-user agreements in Chapter 3, Part III C which covers e-books, musical recordings and films distributed online.

⁷¹ This transformation raises multiple issues around the capacity to own immaterial copies, whether they can qualify as “goods” under sale of goods and consumer law and whether the copyright exhaustion or first sale doctrine applies to commercial copies distributed online with no physical supporting media: see in particular the discussion in Chapter 3 Part II F, Chapter 7 Part III A (ii) and Chapter 8 Part III and IV.

⁷² Computer programs are protected as “literary works”: *CCA, supra* note 1, s 2; video games can include various subject matter protected by copyright works, e.g., “artistic works”, “cinematographic works”, “literary works”: *ibid*.

⁷³ See in particular the discussion on the case law looking at the nature of computer programs as goods or services, applying sale of goods implied conditions or warranties of quality, fitness for purpose, etc. to computer programs, as well as the application of the exhaustion or first sale doctrine to computer programs in Chapter 7 Part IV and Chapter 8.

Throughout my thesis I refer predominantly to *copyright holders* as opposed to authors. *Copyright holders* refers to persons who hold the exclusive rights conferred by copyright under the *CCA* (or similar statutes in other jurisdictions as the context may dictate).⁷⁴ This includes authors, i.e., the physical persons who created the copyright works. Given the focus of my thesis on *commercial copies of copyright works*, copyright holders other than the authors will generally hold copyrights (e.g., publishers, music recording producers and distributors, film producers, software and video games companies, etc.). My decision to refer to *copyright holders* rather than to *authors* does not imply that the interests of copyright holders (who are not the authors) and authors are the same. Often, their interests are not aligned.⁷⁵ My selection of terminology is driven by the identity of the right holders in the mass-market commercialization environment focus of my research. It is beyond the scope of my thesis to discuss in detail the divergence of interests between copyright holders (who are not authors) and authors. Finally, *copyright holders' rights* refers to the bundle of exclusive rights or *copyright* conferred to copyright holders under the *CCA*, more specifically, those rights that impact the uses that consumers can make of commercial copies of copyright works.⁷⁶ This includes exclusive rights commonly referred to as *related rights* or *neighbouring rights*.⁷⁷

⁷⁴ The *CCA*, *supra* note 1, refers throughout the Act to “the owner of the copyright” or “copyright owner”.

⁷⁵ For a discussion on the protection of freelance authors in copyright law, see Giuseppina D’Agostino, *Copyright, Contracts, Creators, New Media, New Rules* (Cheltenham, UK: Edward Elgar Publishing, 2010) and in particular, with respect to the misalignments between the interests of authors and copyright holders and how the rights and interests of authors can be better protected, see pp 201-289. See also Giuseppina D’Agostino, “Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use” (2008) 53 McGill L.J. 309 at 327-329. In my thesis, I make specific references to *authors* as opposed to *copyright holders* when legal doctrines or theoretical justifications of copyright specifically apply to the physical person who creates a work-protected by copyright. See for example, the discussion in Chapter 6 Part III.

⁷⁶ The *CCA*, *supra* note 1, s 2 defines “copyright” as “the rights described in (a) section 3, in the case of a work, (b) sections 15 and 26, in the case of a performer’s performance, (c) section 18, in the case of a sound recording, or (d) section 21, in the case of a communication signal.”

⁷⁷ *Ibid.* Neighbouring rights refers to the exclusive rights in other subject matter of copyright than works i.e., performer’s performances, sound recordings, communication signals: *CCA*, *supra* note 1, s 2 “Copyright”, ss 15, 18, 21, 26.

IV. Contents and Structure

My thesis is divided into four Parts. In the First Part, I present the current landscape of Canadian copyright law confronting consumers in a global context, with reference to the other jurisdictions examined here.⁷⁸ I start by situating the place of users and among those users, consumers in copyright law.⁷⁹ I then take a look at the so-called users' rights that copyright consumers have pursuant to the *CCA*, and review those acts that copyright consumers can perform on copyright works without the authorization of copyright holders.⁸⁰ I probe into the nature of copyright users' rights and question whether they are mandatory, while also situating them in the context of Canada's international obligations.⁸¹ I look at the complex interaction between the *CCA*, the contracts and TPMs through which copies of copyright works are commercialized, and present a sample review of non-negotiated standard end-user agreements of e-books, music, and films distributed online.⁸² I point to the many areas of uncertainty around copyright consumers' rights that call for a better understanding of the nature of commercial copies of copyright works and of consumers' rights therein.

In the Second Part of my thesis, I apply property law and theory as a legal and normative framework to better understand the nature and scope of rights in commercial copies of copyright works and the theoretical justifications that underpin those rights.⁸³ I start by defining important concepts, including *ownership* and *property limitations*.⁸⁴ Because of the interdependence between consumers' rights and copyright holders' exclusive rights in copyright works, I then look at the nature of copyright through the traditional attributes of property.⁸⁵ I move on to describe the distinct nature of commercial copies of copyright works as a unique form of personal property that is heavily constrained by the exclusive

⁷⁸ In particular, see the discussion on the influence of international copyright law and the laws of Canada's major trading partners in Chapter 3 Part III B and V. The jurisdictions that I focus on outside of Canada are the US, the EU, the UK, and France.

⁷⁹ See Chapter 2: "Copyright Users and Consumers in the Copyright House."

⁸⁰ See Chapter 3: "The So-Called Users' Rights."

⁸¹ *Ibid*, Part IV and Part V.

⁸² *Ibid*, Part III.

⁸³ Second Part: "The Application of Property Law and Theory to Copyright and Commercial Copies of Copyright Works."

⁸⁴ See Chapter 4: "Laying the Framework: Property, Ownership, and Property Limitations."

⁸⁵ See Chapter 5: "The Nature of Copyright."

rights of copyright holders in the work.⁸⁶ I look at the theoretical justifications that withstand ownership in commercial copies of copyright works as a means to develop a normative framework to define what copyright consumers' rights in commercial copies of copyright works should be.⁸⁷ As a result, I observe how copyright consumers may be getting less and less of what they should expect through copy ownership and how this can undermine the credibility and coherence of copyright and, over time, its legitimacy.⁸⁸ I complete the Second Part of my thesis by demonstrating how the framework of property law and theory helps to mediate between the competing property rights of copyright consumers and copyright holders in the work through the concept of "property-limitation rules."⁸⁹ Through the standardization of property or the *numerus clausus* principle, I look at how the property law and theory framework can help mediate between the property regime created by copyright and its underlying objectives on the one hand, and contract terms that alter this property regime and underlying objectives on the other.⁹⁰ I end the Second Part of my thesis by offering a clearer view of the nature of commercial copies of copyright works and of what the scope of copy ownership should entail, as well as of the mediating tools within property that can help balance competing property rights and legal regimes.⁹¹

In the Third Part of my thesis, I look at how consumer (contract) law and theory can further help to ascertain copyright consumers' rights in commercial copies of copyright works as a mean to resolve the asymmetry between copyright consumers and copyright holders under copyright law.⁹² I begin with assessing the nature of commercial copies of copyright, i.e., whether they are goods, services, or of a *sui generis* nature, by applying three dichotomies: tangible v. intangible, goods v. services, and sale v. licence.⁹³ I then move on to describe the nature and theoretical justifications of the relevant consumer protection obligations that can be invoked against copyright-based use restrictions on commercial copies of copyright

⁸⁶ See Chapter 6: "The Nature and Justifications of Ownership in Commercial Copies of Copyright Works", Part II.

⁸⁷ *Ibid*, Part III.

⁸⁸ *Ibid*, Part IV.

⁸⁹ See the discussion in Chapter 7: "The Solutions within Property Law and Theory to Mediate between Competing Property Rights and Competing Legal Regimes."

⁹⁰ *Ibid*, Part IV.

⁹¹ *Ibid*, Part V.

⁹² Third Part: "The Application of Consumer Law and Theory to Commercial Copies of Copyright Works."

⁹³ See Chapter 8: "Commercial Copies of Copyright Works: Unfit to be Goods?"

works (i.e., implied obligations of quality, fitness for purpose beyond general quality issues of bugs or manufacturing defects, title and quiet possession, prohibitions against unfair commercial practices, and information disclosure requirements).⁹⁴ This allows me to conclude the Third Part of my thesis by contemplating four distinct scenarios and by analyzing how use restrictions applied to commercial copies of copyright works may constitute a breach of the relevant consumer law obligations and enable copyright consumers to assert their rights.⁹⁵

The Fourth Part of my thesis builds on the insights gained from the First Part through the Third Part. I observe that copyright consumers' rights need to be solidified at the level of the *CCA*; otherwise, deficiencies in the scope of rights allocation have rippling effects on the effective application of consumer law and other areas of the law. I make other recommendations about the implementation of more robust consumers' rights to commercial copies of copyright works.⁹⁶ The recommendations include clarifying the nature of exceptions to copyright infringement in the *CCA*, a renewed application of the concept of tangibility in copyright law and in sale of goods and consumer law, and legal tools to steer freedom of contract toward the objectives of copyright and property. For now, let us begin the analysis of the copyright consumers' bargain by looking at the place of copyright users and copyright consumers in the copyright house, which is the purpose of the next chapter.

⁹⁴ See Chapter 9: "Paving the Way: The Application of Consumer Law Obligations to Use Restrictions on Commercial Copies of Copyright Works" and Chapter 10: "Justifications and Role of Consumer Law Obligations."

⁹⁵ See Chapter 11: "Restrictions of Uses of Copyright Works as a Breach of Consumer Law Obligations."

⁹⁶ See Chapter 12: "The Renovation Project: A Hospitable Home for Copyright Consumers."

Chapter 2

Users and Consumers in the Copyright House

I. Introduction

Until recently, the place of users in copyright law and the nature of their rights were an under-theorized area of copyright law and policy. The combination of technological developments and copyright reform that I described in Chapter 1, as well as recent Supreme Court of Canada jurisprudence,¹ engendered a growing interest for copyright users in Canada and worldwide. Despite a growing attention on copyright users, a cohesive view and understanding of copyright users are lacking. Their place within the copyright framework, predominantly centred on defining copyright holders' exclusive rights and remedies, is somewhat precarious, almost accidental. Understanding the locus of copyright users within and outside the copyright system is the preliminary step that I take in my research to substantiate their rights and interests.

In this chapter, I look at the place of copyright users through an analysis of Canada's *Copyright Act* [CCA],² case law, policy papers, and doctrinal works. In Part II, I start my investigation into the place of users in copyright law by pointing out their relative absence from copyright law and discourse. I then review the significance of the Supreme Court of Canada's characterization of exceptions to copyright infringement as *users' rights* in *CCH Canadian Ltd. v Law Society of Upper Canada* [CCH],³ and the location of users within the concept of balance in Canadian copyright law. In Part III, I consider the harmful effects of the lack of attention to copyright users, not only to this group but also to the viability of the copyright law system in the digital environment, as a springboard for the need to develop a theoretical framework around copyright users. In Part IV, I take a closer look at copyright users by distinguishing different subgroups and by focusing on copyright consumers in the larger group of copyright users. I describe the benefits and limitations of focusing my analysis on consumers as they are currently defined in consumer protection law,⁴ and how this can inform the treatment in copyright law of the rights and interests of copyright consumers. In Part V, I pursue the investigation of the place of consumers in

¹In particular *Théberge v Galerie d'art du petit Champlain Inc.*, 2002 SCC 34 [Théberge] and *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, and also *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 [Alberta]; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 [Bell Canada] and *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 [CRTC].

²*Copyright Act*, RSC 1985, c. C-42.

³*Supra* note 1 at para 48.

⁴See *infra* note 127 and note 128, and more generally the discussion in Part V of this chapter.

copyright law through the goals and aspirations they pursue with respect to copyright works, and ask which of those goals copyright law should promote. I conclude in Part VI by describing how the copyright consumers of my study are taking shape and how I started carving out a place for them within the copyright law framework.

II. The place of users in copyright law

If one is looking for the place of users in Canadian copyright law, one will be first led to the recent Supreme Court jurisprudence on copyright. The Supreme Court's characterization of exceptions to copyright infringement as "users' rights" in *CCH*, as recently reaffirmed and further elaborated in three judgments by the same Court in 2012, are among the most significant recent legal pronouncements on the place of users in copyright law.⁵ While users' rights to commercial copies of copyright works are not solely defined through exceptions to copyright infringement, exceptions are increasingly important to understand the scope of users' rights to commercial copies of copyright works.⁶ The Supreme Court jurisprudence affirming that exceptions to copyright infringement are users' rights contrasts sharply with the treatment of copyright users in other jurisdictions that have specifically rejected the concept that exceptions qualified as users' rights.⁷ From that perspective, Canada may be viewed as the champion of users' rights in contemporary copyright law.⁸

In *CCH*, the Supreme Court had to determine whether the custom photocopy service offered by the Great Library to its patrons upon request (including lawyers, law students and members of the judiciary) regarding photocopies of extracts from legal texts fell under the fair dealing exception under section 29 of the *CCA* "for the purpose of research or private study."⁹ In a unanimous judgment, Chief Justice McLachlin qualified fair dealing to be "perhaps more properly understood as an integral part of the

⁵ *CCH*, supra note 1 at para 48; *Alberta*, supra note 1; *Bell Canada*, supra note 1; *CRTC*, supra note 1.

⁶ See the discussion in Chapter 3 Part II. The *CCA*, supra note 2 was amended in 2012 by Canada's *Copyright Modernization Act*, SC 2012, c 20 [*CCMA*] which added new exceptions to copyright infringement and broadened the scope of existing ones.

⁷ See the discussion on the nature of exceptions to copyright infringement in Chapter 3 Part IV A.

⁸ Giuseppina D'Agostino, "Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use" (2008) 53 McGill L.J. 309 at 357. See also the analysis of *CCH* and how it is situated in recent debates on the scope of copyright holders' rights in an international copyright context in Myra J. Tawfik, "International Copyright Law and Fair Dealing as a User Right" (2005) UNESCO Copyright Bulletin, online: http://portal.unesco.org/culture/en/ev.php-URL_ID=27422&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁹ *CCH*, supra note 1 at para 47.

Copyright Act than simply a defence,” adding that fair dealing and other exceptions to copyright infringement were users’ rights.¹⁰ Applying the two-step analysis of fair dealing to the practice by the Law Society, the Supreme Court held that its custom photocopying service was provided for the purpose of research, review and private study and that the Law Society dealings with the copyright works were fair.¹¹

As significant as *CCH* and subsequent judgments by the Supreme Court may be in giving a more prominent place to users in copyright law, one needs to pause. First, the future of the legal principle enunciated in *CCH* remains unclear in light of recent amendments to the *CCA*.¹² Second, *users* remain a largely undefined group under current Canadian copyright law and in the other jurisdictions examined here.¹³ This is consistent with the copyright-holder-centric framework upon which copyright law is construed. The *CCA* centres on defining the myriad works protected by copyright, on the exclusive rights that copyright confers, on providing remedies for copyright infringement, and on setting the rules regarding the collective administration of copyright.¹⁴

Fragmented clues to the identity and treatment of users in Canadian and other copyright laws can be found in the exceptions to copyright infringement or uses that are permitted without copyright holders’ consent.¹⁵ Court decisions that enlighten us on the place of users in copyright law most often involve the interpretation of one of those exceptions to copyright infringement.¹⁶ As I discuss below in this chapter, the

¹⁰ *Ibid* at para 48.

¹¹ *Ibid*, at paras 61ff.

¹² *CCMA*, *supra* note 6. For a discussion on the recent amendments of the *CCA*, see Chapter 3 Part II, III and IV.

¹³ Except for “Educational Institutions,” defined in *CCA*, *supra* note 2, s 2, the *CCA* contains no definition relevant to users or consumers of copyright works. In the US *Copyright Act*, 17 USC § 101, the only definitions relevant to users of copyrighted works are “food service or drinking establishment” and “proprietor” (which is related to a “food service and drinking establishment”). The *Copyright, Designs and Patents Act 1988* (UK), c. 48 [UKCDPA], contains no definition pertaining to users, nor does the French *Code de Propriété Intellectuelle* [CPI].

¹⁴ *CCA*, *supra* note 2, s 2 contains over 50 definitions, two of which relate to a copyright user (definitions of “educational institution” and of “perceptual disabilities”), Part I and Part II define copyright holders’ exclusive rights, Part III defines copyright infringement and lists exceptions to copyright infringement, Part IV lists remedies available to copyright holders, Part VI and Part VII deal with miscellaneous provisions and the collective administration of copyright, and Part VIII deals with the private copying regime.

¹⁵ *CCA*, *supra* note 2, ss 3 (j), 15 (1.1) (e), 18 (1.1) (b), 29- 32.2, 79-86; *US Copyright Act*, *supra* note 13, §107 - §112, §117, §119, §121-§122; EC, *European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, [2001] OJ, L167/10 [Directive 2001/29/EC], art 4 (2), 5; EC, *Parliament and Council Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs*, [2009] OJ, L 111 at 16. [Directive 2009/24/EC], art. 4 (2), 5-6; UKCDPA, *supra* note 13, Chapter III (ss 18(3), 28-76); CPI, *supra* note 13, art L 122-3-1, L122-5, L122-6-1.

¹⁶ In Canada, this is the case in *CCH*, *supra* note 1, where the Supreme Court had to interpret the scope of the application of the fair dealing provisions in the *CCA*. In the US, the Supreme Court judgment *Sony Corp. v Universal City Studios, Inc.*, 464 U.S. 417, 454-55 (1984) (US Supreme Court) on permitted uses by consumers (i.e., home video recording of broadcasts for later viewings) was also based on the application of the fair use

fair dealing provisions in the *CCA* do not refer to users.¹⁷ Acts can be performed for specific purposes, which suggests that they apply *a priori* to a broad range of users.¹⁸ The majority of the other exceptions apply to specific groups of users, including *educational institutions* and *libraries, archives and museums*.¹⁹ The additional exceptions to copyright infringement that were recently introduced in the *CCA* refer to *individuals or persons*.²⁰

Until recently, the interests of users, and more particularly those of consumers, were not specifically considered in Canadian policy papers and reports produced in the context of copyright reform.²¹ By

provisions in the *US Copyright Act*, supra note 13, §107. See also the discussion on the nature of exceptions to copyright infringement in Chapter 3 Part IV A.

¹⁷ *CCA*, supra note 2, ss 29 to 29.2. See the discussion in Part IV of this chapter.

¹⁸ *Ibid.*

¹⁹ *CCA*, supra note 2, ss 29-32.2. For its part, the private copying regime applies to a “person” making reproductions under limited conditions for private use: *CCA*, *ibid.* ss 79-86, in particular s 80. See the discussion in Part IV of this chapter.

²⁰ *CCA*, supra note 2, ss. 29.21-29.24, introduced in 2012 with the entry into force of the *CCMA*, supra note 6. Sections 29.21 to 29.23 refer to *individuals* while section 29.24 refers to *persons*. For a discussion of these new exceptions to copyright infringement, see Chapter 3 Part II D.

²¹ Consumers as a group were rarely if at all mentioned in earlier Canadian policy papers on copyright reform, for example see: Economic Council of Canada, Report on Intellectual and Industrial Property, Information Canada by B.V. Hindley (Ottawa: Economic Council of Canada, 1971); Canada, Department of Consumer and Corporate Affairs, Copyright in Canada – Proposals for a Revision of the Law by A.A. Kayes & C. Brunet (Ottawa: Government of Canada, 1977) at 235, referred more generally to the public interest while acknowledging the greater need to take into account the interests of users. Canada, Departments of Consumer and Corporate Affairs and Communications, *From Gutenberg to Telidon: A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act* (Ottawa: Supply and Services Canada, 1984), referred to users broadly in the context of striking a balance between various interests. House of Commons, Standing Committee on Communications and Culture, “A Charter of Rights for Creators – Report of the Subcommittee on the Revision of Copyright” (Ottawa: Supply and Services Canada, 1985), the Minutes of Proceedings and evidence of the Sub-Committee of the Standing Committee on Communications and Culture on the Revision of Copyright: response to From Gutenberg to Telidon, at 3, emphasized the need for stronger protection of creators’ rights with little consideration for users; Canada, Culture and Communications, Standing Committee on Communications and Culture, *The ties that bind* (Ottawa: The Committee, 1992) (Chair: Bud Bird) at 66, briefly refers to users in the context of the need to provide an equitable balance between the interests of artists and users of their works; NGL Nordicity Group Ltd for Industry Canada, New Media, Information Technologies Industry Branch, Study on New media and Copyright Final Report by P. Lyman, T. Rajan, L. Rocca, L. E. Harris & T. Scapillati, Appendix A, listed the stakeholders interviewed, none of which (with the possible exception of one group, incidentally) represented consumer interests. Similarly, the survey on which the report was based included no reference to user considerations and was instead geared toward how to control better user access; Canada, Intellectual Property Policy Directorate Industry Canada, Copyright Policy Branch, Canadian Heritage, *Consultation Paper on Digital Copyright Issues* (June 21, 2001), online: http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01102.html, concerns for consumers as a group were implicit though out much of the discussion that placed a particular emphasis on the need to balance interests of copyright holders with users’ interests, and Canada’s long standing tradition in that regard. However, there was rarely a specific mention of consumers. See also Canada, Minister of Canadian Heritage and Minister of Industry, *Status Report on Copyright Reform submitted to the Standing Committee on Canadian Heritage*, March 2004, online: <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01133.html>; House of Commons, Standing Committee on Canadian Heritage, *Interim Report on Copyright Reform* (May 2004) (Chair: Sarmite D. Bulte, M.P.), online:

contrast, references to copyright consumers' interests and concerns were part of the Government of Canada's consultations with the public and communications in the latest copyright reform initiatives.²²

Copyright International conventions' primary purpose centres on the promotion and protection of the exclusive rights of copyright holders, both substantively and at a procedural level, through the establishment of minimum standard obligations.²³ Not surprisingly, this source of law offers little insight into the identity and interests of copyright users and reinforces the copyright-holder-centric nature of copyright law. In Chapter 1, I described how technological means of production, dissemination, access, and enjoyment of copies of copyright works have irreversibly changed the dynamics between authors, copyright holders, distributors, users, and consumers.²⁴ While the *digital agenda* that led to the adoption of the *World Intellectual Property Organization Internet Treaties* in 1996²⁵ sought to address the effects of these profound technological changes on the commercial exploitation of copyright holders' works,²⁶ the treaties have failed to adequately take into consideration how the equation would be altered for users and consumers alike. This is particularly apparent in the adoption of the technological protection measure [TPMs] provisions.²⁷ The *WIPO Internet Treaties* impose no counterbalancing obligation on member states to preserve permitted acts on copyright works without the permission of the copyright holders, such as through fair use, fair dealing, and other long-established exceptions to copyright infringement.²⁸ In recent years, initiatives have been undertaken with the primary objective being to rectify the absence of

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1350628&Language=E&Mode=1&Parl=37&Ses=3>. In G. Bruce Doern & Markus Sharaput, *Canadian Intellectual Property, The Politics of Innovating Institutions and Interests* (Toronto: University of Toronto Press, 2000) at 111-116, the authors point to an increased participation of user interest groups in the political debate of copyright, using Bill C-32 (introduced in 1996 and enacted in 1997) as a case study. Among those groups, they refer to broadcasters, educational institutions, public libraries, and museums, but no consumer interests group is mentioned.

²² See Government of Canada official website archives on Bill C-32, *An Act to amend the Copyright Act*, 3rd Session, 40th Parl., 2010 (1st reading June 2, 2010): "Copyright Modernization Act Background," online: http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01151.html. See also Government of Canada official website on the adoption of Bill C-11, *An Act to Amend the Copyright Act*, 1st Sess, 41th Parl, 2011 (assented to June 29, 2012): "Copyright Modernization Act Background," online: http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01237.html.

²³ See the discussion on Canada's international copyright obligations in Chapter 3 Part V.

²⁴ See the discussion in Chapter 1 Part I.

²⁵ The *WIPO Internet Treaties* refer to the *WIPO Copyright Treaty*, 20 December 1996, WO033EN, online: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P8_189 [WCT] and the *WIPO Performances and Phonograms Treaty*, 20 December 1996, WO034EN, online: http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html [WPPT].

²⁶ The digital agenda sought to address "the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works": *WCT*, supra note 25, Preamble.

²⁷ See the discussion on TPMs in Chapter 3 Part III B.

²⁸ *Ibid.*

consideration of copyright users' rights in international conventions. These initiatives include proposals for international instruments that would substantiate the limitations or exceptions to copyright holders' exclusive rights.²⁹ The work programs and official declarations of the World Trade Organization [WTO] and WIPO show a noticeable trend toward the recognition of a need to balance the interests of intellectual property right holders, users, and the public.³⁰ Commentators point to the flexibility that international instruments offer as to how member states can achieve a better balance between the interests of copyright holders, users, and the public.³¹ Pressure is building on legislatures and the judiciary around the world, as well as on international organizations, to better take into account the rights and interests of copyright users and consumers.³²

Prior to *CCH*, copyright users received little attention from Canadian commentators, with notable exceptions.³³ David Vaver situated users in copyright law as follows:

[t]he policy of copyright law has always been to balance competing owner and user interests according to both contemporary exigencies and transcendental imperatives such as free speech and free trade. Without a corresponding user benefit, an owner's right may never have been enacted or retained in that form. User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.³⁴

In *CCH*, the Supreme Court referred to Vaver's localization of users within copyright law when it held that fair dealing, and other exceptions to copyright infringement, are users' rights.³⁵ This characterization of the

²⁹ See the discussion on Canada's international obligations in Chapter 3 Part V.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.* See also the discussion in Chapter 1 Part II on the events that surrounded the signature of the *Anti-Counterfeiting Trade Agreement*, October 1, 2011, online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/intellect_property.aspx?view=d and on the events that followed the introduction in the US of US, Bill HR 3261, *Stop Online Piracy Act*, 112th Cong, 2011, and of US Bill S 968, *Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011*, 112th Cong.

³³ David Vaver, *Copyright Law* (Toronto: Irwin Law Inc., 2000) [Vaver 2000] devotes Chapter 7 of his book to "Users' Rights". See also, Sunny Handa, *Copyright Law in Canada*, (Markham, Ontario: Butterworth Canada, 2002) at 24, 463-66, where the author discussed briefly the place of users in Canadian copyright law and how, in the context of digital technologies, we needed to shift from a copy-base regime to a use-base regime. Handa also noted the need to address personal uses of copyright works (as opposed to commercial uses) more broadly than was the case in Canadian copyright law at the time. Post *CCH*, *supra* note 1, there has been more literature on copyright users in Canada, as I discuss further below in Part II of this chapter. I also discuss the academic literature on copyright users worldwide in Part II of this section.

³⁴ Vaver, 2000, *supra* note 28, at 171.

³⁵ *CCH*, *supra* note 1 at para 48. See also David Vaver, *Intellectual Property Law Copyright, Patents, Trade-Marks*, 2d ed. (Toronto: Irwin Law, 2011) [Vaver 2011] at 215.

boundaries of copyright in *CCH* is consistent with how the majority of the Supreme Court of Canada had previously emphasized the need to place limits on copyright holder rights in *Théberge v Galerie d'Art du Petit Champlain inc.* [*Théberge*].³⁶ In that case, Binnie J. for the majority held that the lawful owner of reproductions of a painting by artist Claude Théberge was not infringing the artist's copyright when it transposed the reproduction from a paper copy onto a canvas. Addressing the inherent tension that subsists between the copyright holder rights in copies of their works and the property rights of the purchaser of the physical copy, Binnie J. stated:

In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.³⁷

The Supreme Court of Canada recently reaffirmed *CCH* in three judgments by holding that copyright users have rights, and in two of the three judgments, brought further clarification to the scope of fair dealing in the *CCA*.³⁸

CCH has been widely commented upon by Canadian scholars with the result that copyright users are receiving more attention in the literature.³⁹ Generally, Canadian scholars salute *CCH*'s emphasis on the place of copyright users in Canadian copyright law. For Giuseppina D'Agostino, *CCH* makes Canada the

³⁶ Supra note 1.

³⁷ *Ibid* at para 31.

³⁸ *Alberta*, supra note 1; *Bell Canada*, supra note 1, where the Court further clarified the scope of fair dealing. I discuss the scope and application of the fair dealing provisions of the *CCA*, supra note 2, in Chapter 3 Part II C. The Supreme Court reaffirmed that exceptions to copyright infringement are user rights in *CRTC*, supra note 1.

³⁹ D'Agostino, supra note 8; Abraham Drassinower "Taking User Rights Seriously", in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 462 [Drassinower 2005]; Daniel Gervais, "Canadian Copyright Law Post-CCH" (2004) 18 I.P.J. 131; Myra J. Tawfik, "International Copyright Law and Fair Dealing as a User Right" (2005) UNESCO Copyright Bulletin, online: http://portal.unesco.org/culture/en/ev.php-URL_ID=27422&URL_DO=DO_TOPIC&URL_SECTION=201.html [Tawfik, UNESCO Bulletin]; Myra J. Tawfik, "International Copyright Law: W[h]ither User Rights?", in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 66 [Tawfik 2005]; Theresa Scassa, "Users' Rights in the Balance: Recent Developments in Copyright law at the Supreme Court of Canada" (2005) 22 CIPJ 133; Carys J. Craig, "The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform", in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law*, (Toronto: Irwin Law, 2005) [Craig 2005]; Abraham Drassinower, "Exceptions properly so-called" in Soled Gendered & Abraham Drassinower, *Langues et droit d'auteur/Language and Copyright* (Cowansville, QC: Yvon Blais, 2009) 217 [Drassinower 2009]; Carys Craig, *Copyright, Communication and Culture, Towards a Relational Theory of Copyright Law* (Cheltenham, UK: Edward Elgar, 2011) [Craig 2011] at 155-202, in particular at 168, 170-174, 179.

champion of the “rights of users to balance copyright,”⁴⁰ thus making Canada the most user-centric jurisdiction of the three jurisdictions compared in her analysis of fair dealing and fair use.⁴¹ Abraham Drassinower describes the significance of *CCH*’s characterization of “user rights,” as well as the Court’s underlying concern for the need to maintain a balance in copyright law, as redefining the author’s copyright by limiting its scope *ab initio*.⁴² The characterization of user rights shifts “exceptions properly so-called” from the periphery of author’s exclusive rights to the core of copyright law.⁴³ Daniel Gervais and Elizabeth Judge present a similar idea about the effects of *CCH*.⁴⁴ Myra Tawfik situates the significance of the characterization of user rights in *CCH* in a broader international context.⁴⁵ She argues that *CCH*’s emphasis on copyright users’ rights is consonant with works undertaken by international organizations, such as WIPO’s initiatives on intellectual property and development.⁴⁶

Discussions on the place of users in copyright law arise as part of broader considerations of the need to preserve a balance between competing interests.⁴⁷ The need to balance the interests of copyright holders and of users has often been mentioned as one of Canada’s copyright policy objectives, as evidenced by a

⁴⁰ D’Agostino, *supra* note 8 at 357.

⁴¹ The three jurisdictions compared are Canada, the UK and, the US: D’Agostino, *supra* note 8 at 358.

⁴² Drassinower 2009, *supra* note 39 at 217.

⁴³ *Ibid.*

⁴⁴ Daniel Gervais & Elizabeth Judge, *Intellectual Property, the Law in Canada* (Toronto: Carswell, 2005) at 88, where the authors describe how *CCH*, *supra* note 1 places the fair dealing provisions of the *CCA* at a higher normative level than the other copyright infringement exceptions, “possibly on an equal footing with authors’ exclusive rights”. They limit the effects of *CCH* of “user rights” to the fair dealing provisions, as opposed to all copyright infringement exceptions under the *CCA*: *Ibid.*, at 81ff. While the Court pronounced judgment on the application of the fair dealing provisions alone, on at least two occasions, in *obiter dicta*, the Court did not limit its qualification of copyright infringement exceptions as “user rights” to the fair dealing provisions. Rather, it explicitly referred to all exceptions to copyright infringement as being user rights: *CCH*, *supra* note 1 at paras 12, 48.

⁴⁵ Tawfik 2005, *supra* note 39 at 66; Tawfik UNESCO Bulletin, *supra* note 39.

⁴⁶ Tawfik UNESCO Bulletin, *supra* note 39. Reacting to a government policy report published at the time (i.e., the Report by the Standing Committee on Canadian Heritage published in May 2004) argues that nothing in those international conventions requires Canada policy-makers “to eviscerate user rights”: Tawfik 2005, *supra* note 39 at 85. In Chapter 3 Part V, I discuss Canada’s international copyright law obligations.

⁴⁷ *Supra* note 39. See also Thomas Dreier, “Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?” in Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First, eds, *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001) 295; Reto Hilty & Sylvie Nérisson, “Overview of National Reports About ‘Balancing Copyright’” (2012), available at SSRN: <http://ssrn.com/abstract=2040607> which is their contribution to Reto Hilty & Sylvie Nérisson, *Balancing Copyright – A Survey of National Approaches* (Verlag: Springer, 2012) 1-78. The report surveys reports submitted by scholars with respect to 40 countries worldwide (including Canada, the US, the UK, and France) about how each jurisdiction approaches the concept of balancing competing interests in copyright law.

review of the federal policy papers and reports of the last decades.⁴⁸ The Supreme Court articulated the concept of balance in Canadian copyright law in *Théberge* and the concept has since become an important interpretative tool in its jurisprudence on copyright. In *Théberge*, the majority of the Supreme Court presented the *CCA* as:

a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).⁴⁹

In *CCH*, the Supreme Court relied on the balance objective of the *CCA* as enunciated in *Théberge* in interpreting fair dealing and other exceptions to copyright infringement as users' rights, as well as the concept of originality in Canadian copyright law.⁵⁰ The Supreme Court frequently reaffirmed the need to preserve a balance in the *CCA* between different objectives as stated by *Théberge*.⁵¹ In *Bell Canada*, Abella J. in a unanimous judgment, described how *Théberge* "reflected a move away from an earlier, author-centric view which focused on the exclusive right of authors and copyright owners to control how their works were used in the marketplace."⁵² While *CCH* and the more recent Supreme Court jurisprudence on

⁴⁸ Keyes and Brunet, *supra* note 21 at 144: "probably the most difficult and sensitive issue of copyright law revision is that of striking a balance between the interests of creators of copyright material and the users of such material. The issue is most apparent when users seek increased and new derogations from the rights of authors," and at 235, the authors acknowledged the need to balance the interests of copyright holders and users and made recommendations to that effect, including the establishment of a copyright tribunal to regulate the collective management of copyright. *From Gutenberg to Telidon: A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act*, *supra* note 21 at 1, posited the objective of a balance between competing interests while favouring market *laissez faire*: "Technological change has fundamentally altered the relationship between creators and users of their works. Consequently, throughout the revision process, the government has given particular consideration to producing a revised Act that strikes a fair balance between creators and users. In general, given strong and competitive markets, the new Act will achieve this balance by setting out clear definitions of the property rights of creators. There should then be no need for the government to intervene in individual transactions in determining how much remuneration creators should receive, or how their works should be made available to the public," and at 87. In *Culture and communications: the ties that bind*, *supra* note 21 at 66, the standing committee on communication and culture recommended that "in recognition of the rights of artists to be fairly compensated for the use of their creative works, the Government of Canada introduces measures, including amendments to the copyright act that provide an equitable balance between the interests of artists and the users of their works." In *Consultation Paper on Digital Copyright Issues*, *supra* note 21 at 6-7, 22-24, great emphasis was placed on the need to balance the interests of copyright holders with users' interests.

⁴⁹ *Théberge*, *supra* note 1 at para 30.

⁵⁰ *CCH*, *supra* note 1 at paras 10, 14-36 (in particular 23-24), 48.

⁵¹ *Supra* note 1; *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, 2004 SCC 45 at para 40; *Euro-Excellence Inc. v Kraft Canada Inc.*, 2007 SCC 37 at para 76; *Bell Canada*, *supra* note 1 at para 9; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 at para 7; *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para 40; *CRTC*, *supra* note 1 at para 64.

⁵² *Supra* note 34 at para 9, citing *Bishop v Stevens*, [1990] 2 S.C.R. 467, at 478-79.

copyright tend to support that view,⁵³ what does that “move away from an earlier author-centric view” of copyright represent for copyright users? Where do copyright users come in the balance between different objectives as they are described in *Théberge*?

The need to preserve a balance within the *CCA* between different objectives, as stated by *Théberge*, can lead to the hasty conclusion that “promoting the public interest in the encouragement and dissemination of works of the arts and intellect” benefits the public and copyright users, and “obtaining a just reward for the creator” benefits authors and creators.⁵⁴ A closer look reveals that such a view misrepresents whose interests are at stake under each objective.⁵⁵ On each side of the balance described by Binnie J. in *Théberge*, both users and copyright holders’ interests are present. On one side of the balance: “the encouragement and dissemination of works” are both to the benefit of copyright holders, users and the public interest. On the other side of the balance: “obtaining a just reward for the creator” benefits authors and copyright holders but can also be in the interest of copyright users to the extent that it incentivizes the creation of more works.⁵⁶ While it is fair to say that *Théberge*’s enunciation of the balance in the *CCA* has been interpreted in *CCH*, and more recently in *Alberta*, *Bell Canada* and *CRTC*, in a manner that gives more space to copyright users in the *CCA*,⁵⁷ a closer look at *Théberge* reveals that copyright users are a bit lost in the balance, amidst the public interest and the interests of creators and right holders.⁵⁸

⁵³ *Supra* note 50 and note 51. I discuss *CCH* and more recent Supreme Court jurisprudence on fair dealing as a users’ right in Chapter 3 Part II C.

⁵⁴ For a discussion on how the balance of different objectives in the *CCA* (as enunciated in *Théberge*, *supra* note 1 at para 30) has been interpreted and applied, and in particular, how it is misleading to assimilate the interests of copyright holders to the ones of authors, and place them in opposition to the public interest and copyright users, see D’agostino, *supra* note 8 at 327-329. See also Canadian Heritage, Copyright Policy Branch, “Fair Dealing after *CCH*” by Giuseppina D’Agostino (Ottawa, Canadian Heritage, 2007) online: <http://www.pch.gc.ca/pc-ch/org/sectr/ac-ca/pda-cpb/publctn/cch-2007/index-eng.cfm>, at 15-17.

⁵⁵ *Ibid.*

⁵⁶ For a discussion on the incentive theory in copyright law see Chapter 6 Part III B.

⁵⁷ *CCH*, *supra* note 1 at paras 10, 14-36 (in particular 23-24), 48; *Alberta supra* note 1; *Bell Canada*, *supra* note 1; *CRTC*, *supra* note 1.

⁵⁸ *Supra* note 54. The same can be said with respect to the place of authors in the balancing act: *ibid.* See also Scassa, *supra* note 39 at 135: “The Supreme Court of Canada’s balancing approach is, in general, a positive development from a copyright user’s perspective. However, its significance should not be overstated. ... [E]ven the Supreme Court of Canada is not entirely clear as to whose interests are to be balanced.” For a discussion on the difficulties around the application of the concept of balance in copyright law, see also: Abraham Drassinower, “From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law” (2009) 34 *The Journal of Corporation Law*, 991. For a survey of the concept of balance in the copyright law of 40 countries see Hilty & Nérison, *supra* note 43, in particular at 90 where the authors conclude, based on the countries surveyed, that copyright law is still predominantly focused on the exclusive rights of copyright holders and hence that the

To situate users' and more particularly consumers' interests within the broader public interest fails to take into account the dynamics at play for this group within the copyright law framework. In a report prepared for the European Parliament on the interaction between copyright law and consumers' rights, Séverine Dusollier summarizes the complexity of the interaction between copyright holders, the public interest, and the consumers as one where interests are partly in opposition and partly in juxtaposition:

... the public has a twofold interest in copyright law. First, the public is the natural recipient of copyrighted works and is hence concerned by an adequate protection of copyright, ensuring creation and dissemination thereof in the public sphere. In that sense, the public interest rejoices that of the copyright owners. On the second hand, the public also wish [sic] for a limited copyright, as its access to culture, knowledge and information can be granted by the necessary boundaries of literary and artistic property. ... However, the interests of consumers cannot be equated anymore solely with that of the public in copyright law. With the digital advent, the consumer has taken a more central role in copyright, as the mere use of a work has now entered into the copyright realm.⁵⁹

Dusollier notes that consumers have distinct interests that are not well served in a public interest discourse.⁶⁰ In fact, just as it is the case with copyright holders' exclusive rights, the rights of copyright consumers involve the promotion of private interests that can be aligned with the broader public interest but are nevertheless distinct.⁶¹ Copyright consumers enjoy copyright works for purposes distinguishable from those of other users and enter into commercial transactions that often include non-negotiated standard end-user agreements, raising specific issues about the interaction between copyright and contracts.⁶²

The trend toward a growing interest in the place of users in Canadian copyright law is consistent with what took place in other parts of the world, including the US and Europe. Until recently, work focusing on the

discussion around a balance in copyright law may be more rhetorical than a substantive interpretation tool. For a critique on the difficulty of applying the concept of balance in copyright law see: Normand Siebrasse, "A property rights theory of the limits of copyright" (2001) 51 U. Toronto L.J. 1, at 5-13.

⁵⁹ European Parliament, DG for Internal Policies, Policies Department: Citizens' Rights and Constitutional Affairs, "The Relations Between Copyright Law And Consumers' Rights From A European Perspective" by Séverine Dusollier (2010) [Dusollier 2010] at 8-9.

⁶⁰ *Ibid.*

⁶¹ See Jeremy de Beer and Robert Tomkowicz "Exhaustion of Intellectual Property Rights in Canada" (2009) 25 C.I.P.R. 3 at 22-23 who argue that "public" considerations must take into account the private property rights of individual users: "... the public is nothing more than a great number or individuals who become owners of the tangible property embedding in intellectual property. Thus the attempts to balance the rights of intellectual property owners with the rights of the public must include consideration of the classic property rights exercised by individual users of copyrighted works and patented inventions."

⁶² See the discussion in Chapter 3 Part III. I apply consumer protection law to commercial copies of copyright works in the Third Part of my thesis (Chapter 8 to Chapter 11).

place of users in copyright law was scarce; the earlier work of Ray Patterson & Stanley Lindberg, *The Nature of Copyright: A Law of Users Rights*,⁶³ being one notable exception. Thankfully, with authors such as Patterson & Lindberg,⁶⁴ Jessica Litman,⁶⁵ Julie E. Cohen,⁶⁶ Joseph P. Liu,⁶⁷ Niva Elkin-Koren,⁶⁸ Lucie Guibault,⁶⁹ Natali Helberger,⁷⁰ Bernt Hugenholtz,⁷¹ Deborah Tussey,⁷² and others,⁷³ a doctrine on the identity and place of the copyright user is emerging.

In the earlier book by Patterson and Lindbergh, *The Nature of Copyright: A Law of Users Rights*,⁷⁴ the authors argued, on the basis of an historical review of US copyright law, that the purpose of the protection of copyright under the US Constitution is to promote learning, not to provide incentives to creators.⁷⁵ The exclusive right of authors to publish their writings presupposes the right of users to make personal use of copyrighted works.⁷⁶ For Patterson and Lindbergh, the place of users (the public) is central to the understanding of copyright law and yet is perhaps its least understood component.⁷⁷ The personal use right,⁷⁸ grounded in the US Constitution, is limited to the act of learning and is distinct from any use that is

⁶³ L. Ray Patterson, & Stanley W. Lindberg, *The Nature of Copyright: A Law of Users Rights* (University of Georgia Press: Athens, Georgia, 1991).

⁶⁴ *Ibid.*

⁶⁵ Jessica Litman, *Digital Copyright* (Amherst: Prometheus Books 2001) [Litman 2001]; see also Jessica Litman, "Lawful Personal Use" (2007) 85 Tex. L. Rev. 1871 [Litman 2007].

⁶⁶ Julie E. Cohen, "The place of the User in Copyright Law" (2005) 74 Fordham Law Review 347 [Cohen 2005].

⁶⁷ Joseph P. Liu, "Copyright Law's Theory of the Consumer" (2003) 44 B. C. L. Rev. 397 [Liu 2003]; see also Joseph P. Liu, "Enabling Copyright Consumers" (2007) 22 BTLJ 1099 [Liu 2007].

⁶⁸ Niva Elkin-Koren, "Making Room for Consumers Under the DMCA" (2007) 22 Berkley Technology Law Journal, 1119.

⁶⁹ Lucie Guibault & Natali Helberger, "Copyright law and Consumer Protection" (2005) study carried out for the European Consumer Law Group, ECLG/035/05.

⁷⁰ *Ibid*; Natali Helberger & P. Bernt Hugenholtz, "No place like home for making a copy, private copying in European copyright law and consumer law" (2007) 22 Berkeley Tech. L.J. 1061.

⁷¹ Helberger & Hugenholtz, *supra* note 70.

⁷² Deborah Tussey, "From Fan Sites to File Sharing: Personal Use in Cyberspace" (2001) 35 Ga. L. Rev. 1129.

⁷³ In particular, works that focus on copyright consumers: Antonina Bakardjieva Engelbrekt, "Accommodating the interests of the copyright consumer: New institutional dynamics in the wake of the infocore directive" in Antonina Bakardjieva Engelbrekt, Ulf Bernitz, Bengt Domeij, Annette Kur & Jonas Nordell, eds, *Särtryck ur Festschrift till Marianne Levin* (Norstedts Juridik: 2008); Jens Schovsbo, "Integrating Consumer Rights into Copyright law: From the European Perspective" (2008) 31 J Cons Policy 393; Peter Rott, "Download of Copyright-Protected Internet Content and the Role of (Consumer) Contract Law" (2008) 31 J. Consum. Policy 441; Dusollier 2010, *supra* note 59.

⁷⁴ Patterson & Lindberg, *supra* note 63.

⁷⁵ *Ibid* at 191.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid* at 193, where the authors define personal use as a use "for one's own learning, enjoyment, or sharing with a colleague or friend – without any motive for profit."

permitted under the doctrine of fair use.⁷⁹ Patterson and Lindbergh took a provocative stance on the place of users in what they viewed at the time as an increasingly copyright-holder-centric system.⁸⁰ They neither articulated the nature of those users' rights nor did they attempt to reconcile that view with what copyright law had become, regardless of its historical origins.⁸¹

More recently, scholars who seek to define the place of users in copyright law almost invariably decry the lack of a cohesive theory around users.⁸² I next will explore the detrimental effects of the lack of attention to users within the framework of copyright law⁸³ before describing the distinctiveness of copyright consumers among the broader category of copyright users⁸⁴ and how theories about copyright consumers' aspirations are taking shape for the better understanding of the place and importance of consumers within the framework of copyright.⁸⁵

III. The place of users outside copyright law

The relative absence of users from copyright law and discourse is detrimental to copyright users and to the solidity of the copyright house. In *Digital Copyright*, Litman describes from a US perspective how a lack of attention to users' rights and interests results from users' limited representation in copyright reform processes, and is one of the causes for the progressive expansion of copyright holders' exclusive rights that I described in Chapter 1.⁸⁶ As a result, the sphere of permissible uses of copyright works by users is increasingly at the mercy of copyright holders' control with justifications that are not always apparent to users.⁸⁷ Copyright law is increasingly removed from its primary intended beneficiaries, and is incomprehensible and even counterintuitive to most copyright users.⁸⁸ A central theme of Litman's work is that the copyright legal framework, with its primary focus on the exclusive reproduction right of copyright

⁷⁹ *Ibid.*

⁸⁰ *Supra* note 63.

⁸¹ *Ibid.*

⁸² Litman 2001, *supra* note 65 at 70ff.; Liu 2003, *supra* note 67 at 398; Cohen 2005, *supra* note 66 at 347; Elkin-Koren, *supra* note 68 at 1137; Helberger & Hugenholtz, *supra* note 70 at 1066; Schovsbo, *supra* note 73.

⁸³ See the discussion in Part III of this chapter.

⁸⁴ See the discussion in Part IV of this chapter.

⁸⁵ See the discussion in Part V of this chapter.

⁸⁶ Litman 2001, *supra* note 65 at 22ff. See my introductory comments on the progressive expansion of copyright holders' exclusive rights at the international level and in Canada in Chapter 5 Part II.

⁸⁷ Litman 2007, *supra* note 65 at 1872.

⁸⁸ Litman 2001, *supra* note 65 at 29, 85-86.

holders, is less and less palatable for the end-user in the digital age.⁸⁹ Cohen voices the same concerns and describes how the copyright users' absence is reflected in the design of the *US Copyright Act*, in judicial decisions, and in the practice of copyright holders,⁹⁰ emphasizing the importance of developing a theory of copyright users "to define the appropriate relationship between design and liability in the networked digital age."⁹¹ Laws that are not understood are less likely to be obeyed.⁹² In response to Litman, Jane Ginsburg acknowledges that "the copyright system cannot infinitely absorb cognitive dissonance," but at the same time she is skeptical that a better understanding of the law will make copyright users more compliant.⁹³

The digital environment poses a formidable and unprecedented regulatory challenge to the sustainability of the copyright law framework. On the one hand, new technologies make copyright users' relationship with copyright works more diverse, interactive, and intimate than ever before, but also augment the possibility of copyright infringement as defined under current laws.⁹⁴ On the other hand, new technologies empower copyright holders to control access and use of and to monitor the copies of copyright works they make commercially available. As I will discuss in Chapter 3, copyright law in Canada and worldwide has embraced this technological empowerment by granting additional protection to copyright holders by the adoption of TPMs.⁹⁵

The answers to the regulatory challenge brought on by the digital environment as it continues to evolve oppose two views in the midst of two extreme scenarios. From the first view, the scope of copyright holders' exclusive rights can be legitimately expanded as new technologies allow copyright protection to be actualized in a manner that could not be achieved before. The shift "from having copies to experiencing

⁸⁹ *Ibid* at 29, 85-86.

⁹⁰ Cohen 2005, *supra* note 66 at 373: "... the user's absence from copyright doctrine is a self-perpetuating phenomenon. Systemic failure to consider the user both legitimates judicially driven elision and encourages right holders and technology developers to ignore the user as a matter of practice."

⁹¹ Cohen 2005, *supra* note 66 at 362.

⁹² Tussey, *supra* note 72 at 1182-1183: "Current regimes are far too arcane to be comprehensible, and that which is not comprehensible is unlikely to be obeyed." See also David Vaver, "Canada's IP Laws, Amiss and A Mess", October 15, 2008, IP Osgoode, online: <http://www.iposgoode.ca/2008/10/canada%e2%80%99s-ip-laws-%e2%80%93-amiss-and-a-mess/> commenting on intellectual property statutes in Canada: "They are not user friendly for lawyers or for those whose conduct is supposed to be regulated by them – inventors, authors, business, and the general public. Laws like these are a costly dead weight on the economy."

⁹³ Jane C. Ginsburg, "Can Copyright become User-Friendly? Review: Jessica Litman, Digital Copyright" (2001) 25 Colum. J.L. & Arts 71 [Ginsburg 2001], at 82, 88-89. In Ginsburg's view, users will respect copyright law when they have no choice "as most users will be technologically and legally disabled from impeding the exclusivity of copyright": *ibid* at 82.

⁹⁴ See the discussion in Chapter 1 Part I on how new technologies in the digital environment empower copyright users in unprecedented ways; *CCA*, *supra* note 2, Part III (ss 27ff).

⁹⁵ See the discussion in Chapter 3 Part III B.

works”⁹⁶ confers on copyright holders the ability and right to control access at every step of the use of the works that they make commercially available.⁹⁷ This is essential for adequate protection of copyright holders in the creation and dissemination of copyright works in the digital environment.⁹⁸ Copyright law is concerned about the users only in so far as it encourages authors to create works for the consumption of their intended beneficiaries.⁹⁹ As I explained in Chapter 1, recent developments in copyright law, in Canada and worldwide, lean toward this view to varying degrees.¹⁰⁰

From the second view, and primarily in response to the first view, new technologies force us to question the rights and position of users within copyright law in a way that was not so pressing before.¹⁰¹ Copyright was never intended solely to protect copyright holders’ interests, but rather reflects a bargain between copyright holders and the public.¹⁰² Refusing to take into account the interests of copyright users poses the

⁹⁶ Jane C. Ginsburg, “Essay: from having copies to experiencing works: the development of an access right in U.S. copyright law” (2003) 50 J. Copyright Soc’y U.S.A. 113 [Ginsburg 2003].

⁹⁷ *Ibid* at 120-121: “the right to control the manner in which members of the public apprehend the work. The concept is distinct from reproduction or communication to the public to the extent that I may communicate a copy of my work to the user’s hard drive, or the user may purchase a digital copy such as a CD ROM, but the user may not ‘open’ the work to apprehend (listen to, view) its contents, unless the user acquires the ‘key’ to the work. And the key may vary with the nature and extent of enjoyment of the work.”

⁹⁸ Ginsburg 2003, *supra* note 96.

⁹⁹ Jane C. Ginsburg, “Authors and Users in Copyright” (1997) 45 J. Copyright Soc’y U.S.A. 1 [Ginsburg 1997] at 20: “End-users are indeed the ultimate beneficiaries, but they benefit because copyright is a law that seeks to promote authorship by ensuring authors a financial return from and reasonable control over the exploitation of their works. Copyright is a law about creativity; it is not, and should not become, merely a law for the facilitation of consumption.” However, in later works Ginsburg acknowledges that while access controls are essential to copyright holder, consumer rights should be respected. See Ginsburg 2003, *supra* note 96 at 123.

¹⁰⁰ See the discussion on the progressive expansion of copyright holders’ exclusive rights at the international copyright level, in Canada and other national jurisdictions in Chapter 5 Part II, in particular the recent wave of intellectual property regulation (e.g., *ACTA*, *HADOPI*, and *SOPA*), that seeks to confer greater enforcement powers to copyright holders against Internet intermediaries and individual users. See, however, the discussion in Canada about balancing competing interests, including the rights of users, in Part II of this chapter.

¹⁰¹ See the discussion in Chapter 1 Part I about the multiplicity of acts that users can now perform on copyright works and how their interaction with them is more intimate than ever before.

¹⁰² Patterson & Lindburg, *supra* note 63 at 191, where the authors argue that the constitutional parameters and foundation of copyright are to promote learning by granting authors exclusive right to publish their writings. This presupposes right of other citizens to make personal use of copyright works. See also Patterson & Lindburg, *ibid* at 208, 209, 211; Litman 2001, *supra* note 65 at 80-81 where the author notes how in a strict economic analysis of copyright we lose sight of this bargain, as well as with the recent legal developments conferring more control to copyright holders over their works; see also: Glynn S. Lunney, Jr., “The Death of Copyright: Digital Technology, Private Copying and the Digital Millennium Copyright Act” (2001) 87 Va. L. Rev. 813; Litman 2007, *supra* note 60 at 1879, where the author refers to “copyright liberties” as being an integral part of what the copyright system always sought to protect and promote, i.e., the fact that “copyright law was designed to maximize the opportunities for non exploitative enjoyment of copyrighted works in order to encourage reading, listening, watching, and their cousins.” The author argues that they are “both deeply embedded in copyright’s design and crucial to its promotion of the ‘Progress of Science.’”

threat of undermining the fundamental values that underlie the copyright system.¹⁰³ Although this view is receiving more attention in the copyright doctrine and, as I discussed above in this chapter, is getting more support through recent judicial and legislative developments in Canada and elsewhere,¹⁰⁴ those changes progressively secure more protection for copyright holders without much accountability for how they affect the rights and interests of copyright users.¹⁰⁵ The two opposing views on how to address the regulatory challenge brought on by the digital environment are at the heart of the debate in the US on the *raison d'être* of fair use.¹⁰⁶ They are also at the centre of the issue of the legitimacy of TPMs.¹⁰⁷

Technological developments and how the law, copyright holders, users, and the public respond to them can in theory lead to extreme scenarios. One is an Orwellian drift in which copyright holders and states are aligned to deploy all resources and to take all actions that are necessary to eradicate copyright infringement (the scope of which continued to expand). The opposition movement that led to the postponement of the bill presented by the US House of Representatives: *Stop Online Piracy Act [SOPA]*¹⁰⁸ and to the endorsement of the *Anti-Counterfeiting Trade Agreement* in 2011 [*ACTA*]¹⁰⁹ in Europe in 2012 invoked these powerful images of increased state control and surveillance for the benefit of selected private

¹⁰³ Litman 2007, *supra* note 60 at 1098: “Insisting that personal uses deserve no special treatment under copyright law, in contrast, poses huge risks of undermining copyright’s historic liberties, and with them the architecture implicit in the copyright system.”

¹⁰⁴ See the discussion in Part II of this chapter.

¹⁰⁵ See the discussion in Chapter 3, in particular Part III and Part IV. As Helberger and Hugenholtz, *supra* note 70 at 1096-1097 describe it, the relative absence of users from copyright law and its discourse makes any attempt to put their interests forward an “up hill struggle.”

¹⁰⁶ More specifically, the debate revolves around the fate of consumptive uses (as opposed to transformative or creative uses) that have traditionally been permitted through the application of fair use in the US and whether allowing such uses is still justified in an environment where copyright holders have the ability to control each and every step of the uses of their works. In other words, the debate centres around the justifications behind allowable consumptive uses under the fair use doctrine as resulting from a market failure that is progressively vanishing in the digital environment or as something that seeks to preserve other interests as part of the copyright system. See: Wendy J. Gordon, “Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and Its Predecessors,” (1982) 82 Columbia Law Review 1600; Tom W. Bell, “Fair use vs. Fared use: the Impact of Automated Rights Management on Copyright’s Fair Use Doctrine” (1998) 76 N.C. L. Rev. 557; Glynn S. Lunney, Jr., “Fair Use and Market Failure: Sony Revisited” (2002) 82 B.U. L. Rev. 975; Wendy J. Gordon, “Market Failure and Intellectual Property: A Response to Professor Lunney” (2002) 82 B.U.L. Rev. 1031 1043; Raymond Shih Ray Ku, “Consumers and Creative Destruction: Fair Use Beyond Market Failure” (2003) 18 BTLJ. 539; Wendy J. Gordon & Daniel Bahls, “The Public’s Right to Fair Use: Amending Section 107 to avoid the ‘Fared Use’ Fallacy” (2007) Utah L. Rev. 619. I discuss the fair dealing/fair use exception to copyright infringement in Chapter 3 Part II C.

¹⁰⁷ For a discussion on the scope and effects of TPMs, see Chapter 3 Part III B.

¹⁰⁸ *Supra* note 32. See the discussion on *SOPA* in Chapter 1 Part II.

¹⁰⁹ *Supra* note 32. *ACTA* signatory members include Canada, the EU and its Member States, the US, Japan, and Australia. See the discussion on *ACTA* in Chapter 1 Part II.

interests. The opposition movement also raised important questions on prioritizing resources.¹¹⁰ The other extreme scenario is one by which technological developments and how we respond to them call upon a *tabula rasa*, leading even to the eradication of copyright. This drift would result from a combination of factors that could include a renewed understanding of authorship and creation in the digital environment and how previous justifications for the protection of copyright progressively became obsolete, coupled with obstacles to the efficient tackling of copyright infringement.¹¹¹ For reasons that may be obvious, and others that I discuss in the Second Part of my thesis, neither extreme is likely to occur in the near future.¹¹²

Thinking about the gloomy prospect of the two opposite drifts that I described above on the future of copyright (i.e., absolute state enforcement of stronger copyright and copyright extinction) leads to the need to look under a different light at the place of users as an integral part of the copyright house. Rather than being in opposition to copyright holders' rights, defining copyright users' rights and interests is about increasing copyright's legitimacy and ultimately its subsistence. It is also about better understanding the boundaries and legitimacy of users' rights to copyright works. While it may have been possible in the past, thinking about copyright holders' rights without due consideration of copyright users' rights is no longer sustainable in a digital environment. As a basic premise, the increased threat of copyright infringement brought on by the digital environment does not only serve the argument for greater copyright protection, it should also serve the argument for seeking more adherence and buy-in from its primary intended beneficiaries, the copyright users. Copyright holders and regulators have focused their attention so far on increased copyright protection at the expense of greater copyright cohesion and adherence. Paradoxically, the quest for greater copyright protection is not likely to make the copyright house stronger; it could make it crumble.¹¹³ Bringing copyright users inside copyright law is the step that I propose to reverse that trend.

¹¹⁰ See for example the comments of IP Justice (an international civil liberties organization) by Robin Gross, "ACTA's Misguided Effort to Increase Govt Spying and Ratchet-Up IPR Enforcement at Public Expense," 21 March 2008, online: <http://ipjustice.org/wp/2008/03/21/acta-ipj-comments-ustr-2008march/> delivered to the Office of the United States Trade Representative on the proposed Anti-Counterfeiting Trade Agreement (ACTA): "IP Justice firmly believes that ACTA's costs to the public far outweigh any public benefit it might provide. The financial expense to tax-payers to fund ACTA would be enormous and steal scarce resources away from programs that deal with genuine public needs like providing education and eliminating hunger. ACTA would burden the judicial system and divert badly needed law enforcement and customs resources away from public security and towards private profit." See also Charles Arthur, "Anti-piracy agreement rejected by European Parliament, but Acta could be revived by European Commission" 4 July 2012, *The Guardian*, online: <http://www.guardian.co.uk/technology/2012/jul/04/acta-european-parliament-votes-against>.

¹¹¹ I discuss the theoretical justifications of copyright and of copy ownership in Chapter 6 Part III.

¹¹² I.e., Chapter 4 to Chapter 7, and in particular in Chapter 6 Part III.

¹¹³ See the discussion on the strong opposition to ACTA, SOPA, and other similar legislation in Chapter 1 Part II and in Part III of this chapter. This strong opposition may illustrate that trend.

Giving shape and place to copyright users begins with an understanding of the various subgroups of users.¹¹⁴ It also requires a comprehension of their aspirations and uses of copyright works and how these fall within the nature and objectives pursued by copyright.¹¹⁵ Next, I will explain the justifications and benefits of concentrating my research on the subgroup of consumers in the broader category of copyright users and underscore the distinctiveness of *copyright consumers* as a field of study, as well as what they share in common with other copyright users.

IV. Copyright users and copyright consumers

While copyright users share common interests that include having access to the greatest volume of copyright works, with flexibility for their possible uses, and under advantageous terms, all users are not equal. Broadcasters, film production companies, libraries, and educational institutions are important users of copyright works. Yet, they have little in common with individual users who download an e-book or a digital musical recording for their personal use. Institutional users have a different bargaining power with copyright holders, different access to information, resources, and representation through associations promoting their interests that vary significantly from the reality of the individual user. Institutional users may or may not have the ability to negotiate the conditions under which they access copyright works, while individual users almost invariably access copyright works through non-negotiated agreements.¹¹⁶ Institutional users may want to use copyright works for commercial purposes, while individual users typically use copyright works for their personal use. All these differences are highly relevant to a better understanding of the place of users within copyright law.

Singling out individual users, and more particularly consumers as I do in my research, from the larger group of copyright users brings important benefits and fills a lacuna in the emerging body of literature on copyright users where the distinctions among the various groups of users are not always set out clearly.¹¹⁷

¹¹⁴ See the discussion in Part IV of this chapter.

¹¹⁵ See the discussion in Part V of this chapter.

¹¹⁶ See the discussion in Chapter 3 Part III C.

¹¹⁷ While some work on the place of users in copyright law focuses explicitly on copyright consumers: Liu 2003, *supra* note 67; Guibault & Helberger, *supra* note 69; Elkin-Koren, *supra* note 68, Helberger & Hugenholtz, *supra* note 70; Dusollier 2010, *supra* note 59, or that it can be inferred by the substantive arguments being developed that the scope of focus is on individual users: Tussey, *supra* note 72; Litman 2007, *supra* note 60, focus on individual users in those works does not necessarily consider the consumer's main characteristics as defined in statutory consumer protection law. Other works addresses users more generally, sometimes with a focus on individual users:

While it may be sometimes inferred by the substantive arguments being developed that a particular group of users, at times consumers are the main scope of investigation, the terminology of *copyright users* can be misleading.¹¹⁸ In addition to the divergence of interests between institutional users and consumers that I just enumerated, it leaves out addressing boundaries that are fundamental in the context of the subject matter of copyright works. How did the users access the works: through a commercial transaction or by browsing the Internet? What is the purpose of the uses: is it for non-commercial or personal purposes or is it for commercial purposes (and among that group, are they uses that impact the economic rights of copyright holders)?¹¹⁹ A specific focus on copyright consumers within the broader group of users requires a look at four features that distinguish copyright consumers and their environment from the broader group of users. First, it forces us to look at those specific values and behaviours that we want to promote and the resulting legal protection that we want to give to individual citizens who access copyright works.¹²⁰ Second, given how consumers are generally defined, it requires a close look at the various purposes and effects of uses of copyright works on the exclusive rights of copyright holders.¹²¹ Third, it requires an investigation of the effects of non-negotiated agreements on the copyright framework and on individual consumers, which is almost invariably how they access copyright works.¹²² Fourth, the commercial transactions that take place between consumers and copyright holders (or their distributors) enable an investigation of the relatively little explored interaction between consumer protection law and copyright law. I will look at the first element, i.e., the aspirations of consumers, below in this chapter,¹²³ after focusing next on the second distinguishing factor of consumers, i.e., the purposes for which they use copyright works. This will clarify legal issues of scope around the identity of copyright consumers that will

Litman 2001, *supra* note 65. See Cohen 2005, *supra* note 66 at 347, where the author refers to the literature criticizing the normative adequateness of referring to consumers for the passive connotation that it has, in the context of how individuals experience information goods (citing Yockai Benkler, “From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access” (2000) 52 Fed. Comm.L.J. 561).

¹¹⁸ *Ibid.*

¹¹⁹ Litman emphasizes those distinctions when defining a right of “lawful personal use” in Litman 2007, *supra* note 60, in particular at 1911-1912, where four broad categories of personal uses are defined based on their enhancement of “copyright holders” and based on their possible effects on copyright holders’ incentives to create.

¹²⁰ I discuss the theoretical justifications of copy ownership and of copyright in Chapter 6 Part III.

¹²¹ I.e., personal uses v. uses performed in a commercial setting, and in both cases, the likely effects of such uses on the exclusive rights of copyright holders.

¹²² The contract terms are typically not negotiated and may or may not be accompanied by explicit terms or end-user agreements: see the discussion in Chapter 3 Part III C.

¹²³ See the discussion in Part V of this chapter.

set the base to examine the third and fourth distinguishing factors of copyright consumers respectively in Chapter 3¹²⁴ and in the Third Part of my thesis.¹²⁵

The consumer protection law analysis to commercial copies of copyright works in the Third Part of my thesis constrains the scope of individuals by how they are defined under the relevant statutory consumer protection laws.¹²⁶ Rather than being a limitation, there are several positive upshots to referring to consumers as they are defined in consumer protection law. The key attributes of consumers under statutory consumer law call upon relevant distinctions to the application of copyright law. These distinctions enable a more refined understanding of how copyright law needs to address the specificity of consumers. Consumers in Canadian provincial (or territorial) statutory consumer protection laws generally refer to *individuals acting for personal family or household purposes and exclude business purposes*.¹²⁷ The definition of consumers is similar in scope in the other jurisdictions examined here.¹²⁸ The function of the definition of *consumer* in consumer protection law is to determine whether a commercial transaction deserves specific legal protection on the basis of an increased vulnerability that results from various forms of asymmetry between the consumer buyer and the supplier seller.¹²⁹

¹²⁴ In particular Chapter 3 Part III.

¹²⁵ I.e., Chapter 8 to Chapter 11.

¹²⁶ I.e., in the Canadian provincial and territory consumer protection statutes, and in the other jurisdictions examined here, i.e., the US, EU, UK, and France: see the discussion below in Part IV of this chapter.

¹²⁷ I.e., Canadian provincial consumer protection laws share similar definitions of consumers: *Consumer Protection Act*, S.O. 2002, c C-30, Schedule A, s 1, [*OCPA*]: “consumer” means an individual acting for personal, family, or household purposes and does not include a person who is acting for business purposes; *Consumer Protection Act*, R.S.Q., c P-40.1, [*QCPA*] s 1(e): “consumer” means a natural person, except a merchant who obtains goods or services for the purposes of his business.” This definition covers purchases that are primarily or accessorially related to the merchant’s business: Nicole L’Heureux, *Droit de la consommation*, 5^e édition (Cowansville, Que: Yvon Blais, 2000) at 34.

¹²⁸ US UCC § 2-103 c) (2004); the various European directives regulating consumer transactions define “consumer” as “any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession,” with some minor variances: EC, *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, [1993] OJ L 95/04 at 29 [*Directive 93/13/EEC*], at art. 2(b); EC, *Parliament and Council Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts*, [1997] O.J. L144/19, art. 2 (2) (which will be repealed by EU, Directive 2011/83/EU, as of June 13, 2014); EC, *Parliament and Council Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees*, [1999] O J L 171, art 1, 2. (a); EC, *Council and Parliament Directive 2011/83/EU of 22 November 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council*, [2011] OJ L 304/64 [*Directive 2011/83/EU*], art. 2 (1) which applies to contracts concluded after June 13, 2014 (art. 28 (2)). In the UK, see the *Unfair Contract Terms Act 1977* (UK), C 50, s. 12, definition of “dealing as a consumer.”

¹²⁹ I discuss the theoretical justifications of consumer protection law in Chapter 10.

The statutory definitions of consumers that focus on individuals acting for personal purposes and not for business purposes have been criticized for failing to adequately address the changing landscape of consumption and commercial practices as it has evolved over the last decades. For example, Yochai Benkler and other commentators question the relevancy of this definition of consumers in the information age, given their more active role and the shrinking gap between traditional “passive” consumers and producers.¹³⁰ These criticisms echo observations on how copyright law currently addresses consumers’ uses of copyright works.¹³¹ Also, it may no longer be justifiable to differentiate individuals who enter into commercial transactions for personal purposes from other individuals given the information product industry practices that treat individual consumers and small businesses on the same basis in mass-market transactions, the staple of information products.¹³²

The criticisms of the narrow definition of consumers in consumer protection laws¹³³ raise important questions. What are the proper criteria that should justify special protection of commercial transactions? Is it not the non-negotiated aspect of the transaction that should give rise to protection regardless of the commercial purpose of the buyer? As I indicated above, the consumer protection law analysis to commercial copies of copyright works in the Third Part of my thesis constrains the scope of individuals by how they are defined under the relevant statutory consumer protection laws¹³⁴ Also, individual buyers who do not fall within the statutory definitions of consumers and who purchase copies of copyright works

¹³⁰ Yochai Benkler, “From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access” (2000) 52 Fed. Comm. L.J. 561 at 564 where the author warns regulators, as they design an information policy, to focus on the dichotomy of consumers v. producers in the information economy as it fails to recognize the active role that consumers now play in the Internet economy. See also Jane Winn, “Introduction: Is Consumer Protection an Anachronism in the 21st Century?”, in *Consumer Protection in the Age of the “Information Economy”* (Aldershot: Ashgate Publishing, 2006) at 1; Cohen 2005, *supra* note 66 at 347. For a discussion on the active consumers, also described as “prosumers,” see Marco B.M. Loos, Natali Helberger, Lucie Guibault, Chantal Mak, Lodewijk Pessers, Katalin J. Cseres, Bart van der Sloot & Ronan Tigner, *Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts* (2011) University of Amsterdam, Centre for the Study of European Contract Law (CSECL), Institute for Information Law (IViR), Amsterdam Centre for Law and Economics (ACLE), online: http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.html at 41ff.

¹³¹ See the discussion in Part V of this chapter.

¹³² Winn, *supra* note 130.

¹³³ I.e., focusing on individuals performing transactions in a personal capacity and not for business purposes.

¹³⁴ I.e., as a result of the portion of my thesis that applies consumer protection laws to copies of copyright works: the Third Part: The Application of Consumer Law and Theory to Commercial Copies of Copyright Works (Chapter 8 to Chapter 11).

subject to non-negotiated standard terms can still benefit from other forms of legal protection.¹³⁵ Moreover, although one can think of many uses of copies of copyright works purchased by individuals in the context of a business undertaking that are no different to uses of individuals for personal non-commercial purposes, and have the same effect on copyright holders' economic rights, purchases made by individuals in a business context can give rise to different levels of interference with copyright holders' exclusive rights than those of purchases made for personal non-commercial purposes.¹³⁶ Finally, while the statutory definition of *consumer* in consumer protection laws may cover a narrower group of individuals that may unjustifiably leave out many others, the analysis that I undertake here to define consumers' rights to copies of copyright works can serve as the basis to define copyright users' rights for a broader range of individuals, at least to the extent that they are supported by similar theoretical justifications and have similar impacts on copyright holders' exclusive rights.

Starting from the premise that consumer protection law confers an additional layer of legal protection on *consumers* as they are defined, how does the *individual acting for personal or household purposes and not for business purposes*¹³⁷ hold up in a copyright law analysis? Until recently, the *CCA* did not refer to *individuals* (or natural persons) in the context of permitted uses of copyright, with a few exceptions.¹³⁸ The amendments to the *CCA* in 2012¹³⁹ introduced three new permitted uses without the authorization of copyright holders that only apply to individuals,¹⁴⁰ and a fourth that applies to a *person*.¹⁴¹ While the majority of limitations on copyright holders' exclusive rights or users' rights either apply to all categories of users, as in the case of fair dealing,¹⁴² or specifically apply to institutional users,¹⁴³ the recent

¹³⁵ For example, the doctrine of unconscionability in the common law or the rules applying to contracts of adhesion in the civil law: e.g., art 1379, 1435-1437 CCQ, offers a particular regime of protection to protect the weaker party in a non-negotiated contract.

¹³⁶ For example, playing music in a business environment that involves patrons may amount to a communication to the public that would require the payment of fees to the designated collective society for the administration of such rights: *CCA*, *supra* note 2, ss. 67ff.

¹³⁷ See the statutory definitions of "consumer" under Canadian provincial and territory statutes and in the other jurisdictions examined here: *supra* note 127 and 128.

¹³⁸ Under the private copying regime, the *CCA*, *supra* note 2, s 79 definition of "audio recording medium" refers to "individual consumers." However, s 80 refers to the "private use of the person who makes the copy."

¹³⁹ *CCMA*, *supra* note 6. See also *CCA*, *supra* note 2, s 32(1) (persons with perceptual disabilities) and s 45(1) (a) (import of two copies by a person for that person's own use which includes physical persons).

¹⁴⁰ *CCA*, *supra* note 2, s 29.21: "Non-commercial user-generated content," s 29.22: "Reproduction for private purposes," s 29.23: "Fixing signals and recording programs for later listening or viewing," and s 29.24 "Backup Copies."

¹⁴¹ *CCA*, *supra* note 2, s 29.24: "Backup copies."

¹⁴² *CCA*, *supra* note 2, ss 29-29.2. See the discussion on fair dealing in Chapter 3 Part II C.

¹⁴³ Or person acting under their authority, such as "educational institutions": *CCA*, *supra* note 2, ss. 29.4ff or "libraries, archives and museums," *CCA*, *ibid*, ss 30.1ff.

amendments to the *CCA* confirm an acknowledgement of the specificity of *individual users* (or natural persons) in the *CCA* more than ever before.¹⁴⁴

With respect to the second distinctive feature of *consumers*, i.e., acting for personal, non-commercial purposes as opposed to business or commercial purposes,¹⁴⁵ until recently, the commercial v. non-commercial purpose distinction was present only to a limited extent in the *CCA*.¹⁴⁶ With the amendments to the *CCA* in 2012,¹⁴⁷ the non-commercial v. commercial distinction became more prominent in copyright law to delineate permitted uses of copyright works¹⁴⁸ or to determine the scope of remedies and damages that are available to copyright holders.¹⁴⁹ The 2012 amendments to the *CCA* also introduced permitted acts on copyright works for “private purposes,” which suggests a narrower sphere within the non-commercial purpose arena that does not involve performances in or communications to the public.¹⁵⁰ The same idea is present in the permitted acts of fair dealing for the purpose of “research or private study,” although there the commercial purpose of the act is not necessarily a bar to the application of this exception to copyright infringement.¹⁵¹ Increasingly the non-commercial purpose of the act performed on copyright works (or *private purpose* or *private use*) becomes relevant in the *CCA* to distinguish between permitted uses of copyright works and infringement.

¹⁴⁴ *Supra* note 135.

¹⁴⁵ As defined by statutory consumer protection laws or codes: *supra* note 127 and 128.

¹⁴⁶ This is the case with respect to limitations on copyright holders’ exclusive rights. For example, certain exceptions to copyright infringement in the *CCA*, *supra* note 2, only apply to actions that are carried out “without motive of gain”: *CCA*, *ibid*, s 29.3.

¹⁴⁷ *CCMA*, *supra* note 6.

¹⁴⁸ *CCA*, *supra* note 2, s. 29.21 “Non-commercial user-generated content.”

¹⁴⁹ *CCA*, *supra* note 2, ss 32.2 (1), 38.1 (1) (b), 38.1 (1.12), 38.1 (1.2), s. 38.1 (5) (d).

¹⁵⁰ *CCA*, *supra* note 2, s 29.22 “Reproduction for Private Purposes” and s 29.23 “Fixing Signals and Recording Programs for Later Listening or Viewing” limit the acts that can be performed on copyright works without authorization to reproduction and fixing communication signals and do not involve communication to the public or performance in public. Contrast these new provisions with the new provision “non-commercial user-generated content”, *CCA*, *ibid*, s 29.21, which permits the reserved acts of performance in public and communication to the public by telecommunication. The fact that permitted acts for “private purposes” apply to individuals only and not persons, as is the case under other permitted acts (e.g., *CCA*, *ibid*, s 29.24 “Backup Copies”; *CCA*, *ibid*, s 30.6, the permitted acts with respect to computer programs) may suggest that it precludes that the act be performed within commercial settings. It would certainly exclude making reproductions for commercial distribution. See the discussion in Chapter 3 Part II D (i), (ii) and (iii).

¹⁵¹ While fair dealing for the purpose of research can occur in the context of a commercial or non-commercial setting: *CCH*, *supra* note 1 at para 51, it is not clear that this is also the case for the purpose of private study because of the word “private”, although under the wide and liberal interpretation of fair dealing in *CCH*, *ibid*, the purpose of “private study” could also extend to commercial ventures. The Supreme Court of Canada recently confirmed that fair dealing for the purpose of private study can occur in a classroom and need not take place in “splendid isolation”: *Alberta*, *supra* note 1 at para 27. This broadens the concept of private study beyond a solo act in the privacy of one’s home or other venue that offers a similar environment.

While the distinction between non-commercial or personal and commercial purposes is increasingly present in the *CCA* to distinguish between permitted and infringing acts, copyright law is still predominantly based on the exclusive right to authorize the performance of certain acts, regardless of their commercial purpose.¹⁵² Consumers who perform acts for non-commercial purposes on copies of copyright works are not necessarily authorized to do so under copyright law, unless copyright holders grant them authorization or they fall under one of the permitted uses.¹⁵³ The special carving out of protection for individuals acting for *personal purposes* under consumer protection laws is mirrored only to some extent in copyright law.

An act-based framework (e.g., reproduction, communication to the public) as opposed to a purposive and use-based framework (e.g., non-commercial, personal purposes) presents increasing normative challenges in the determination of copyright users' rights and copyright infringement in a digital environment.¹⁵⁴ Acts traditionally reserved to the domain of copyright holders, such as reproduction and communication to the public of a copyright work, are intrinsically part of how users experience copyright works in a digital environment.¹⁵⁵ Such acts do not necessarily interfere with the exclusive economic rights of copyright holders.¹⁵⁶ As a result, the purpose of the use, i.e., commercial v. non-commercial or personal, and its effect on the exclusive economic rights of copyright holders offer a base to determine infringement that is more attuned to the new environment of dissemination and uses of copyright works than a strict focus on the occurrence of an act reserved to copyright holders.¹⁵⁷ Litman emphasizes the consonance that the commercial v. non-commercial dichotomy generally has for consumers in distinguishing acts that may infringe copyright from permissible ones.¹⁵⁸ Her proposal for the redesign of copyright in the digital age, which reframes copyright as an "exclusive dissemination right of commercial exploitation" as opposed to a

¹⁵² I.e., the exclusive rights of copyright holders as they are enumerated in *CCA*, *supra* note 2, ss 3, 15, 18, 21, 26.

¹⁵³ *Ibid*; *CCA*, *supra* note 2, ss 29ff.

¹⁵⁴ The increasing inadequacy of an act-based framework to determine the exclusive rights of copyright holders in the digital environment has been widely commented upon. In a Canadian context, see for example Handa, *supra* note 33 at 463-466. In a US context, see Litman 2001, *supra* note 65.

¹⁵⁵ Downloading copies of copyright works from the Internet always involves an act of reproduction which is an act exclusively reserved to copyright holders: *CCA*, *supra* note 2, ss 3, 15, 18, 21, 26. Also, technologies allow reproductions of works for convenience of later playing, viewing, or reading of the work on multiple devices: see the discussion in Chapter 1 Part I.

¹⁵⁶ See the discussion in Chapter 7 Part III.

¹⁵⁷ Jessica Litman, "Revising Copyright Law for the Information Age" (1996) 75 Or. L. Rev. 19, 40-41. See also Tussey, *supra* note 72 at 1183-1184

¹⁵⁸ *Ibid*.

bundle of act-based exclusive rights, touches upon that dichotomy.¹⁵⁹ While the recent amendments to the *CCA* increasingly reflect a purpose-based approach rather than an act-based approach to distinguish permitted acts from copyright infringement,¹⁶⁰ the non-commercial or personal purpose of the act by the consumer does not necessarily make it lawful.¹⁶¹

The non-commercial purpose or capacity, as one distinctive feature of consumers v. other persons entering into commercial transactions, is a point of departure in carving out the space of consumers and the scope of their rights in the copyright law framework. While the non-commercial v. commercial dichotomy serves a different and arguably more prevalent purpose in consumer law than in copyright law,¹⁶² it is becoming increasingly relevant within copyright law to distinguish permitted acts from infringing acts.¹⁶³ The non-commercial v. commercial purpose is also a distinction that consumers can reasonably well understand, a factor that should not be underestimated given the perils, which I highlighted above in this chapter, of a copyright system that becomes too dissonant and removed from the uses of copyright works that actually take place for a large segment of consumers.¹⁶⁴ True, the non-commercial v. commercial dichotomy does not sit perfectly in the copyright framework as a mean to define consumers' or other users' rights to commercial copies of copyright works. Some uses can and should likely be considered as infringement even if they have no commercial purpose.¹⁶⁵ Similarly, not all uses of copyright works that are performed in a commercial environment should, at a normative level, necessarily be considered as an infringement of

¹⁵⁹ Litman 2001, *supra* note 65 at Chapter 12. See also Litman 2007, *supra* note 65 at 1911-1912 where the author develops a spectrum of personal uses that centre around the effects of the use on the incentive to create (related to the commercial exploitation sphere of copyright holders) and the copyright liberties that the uses enhance.

¹⁶⁰ See *supra* note 140. Prior to the 2012 amendments to the *CCA*, *supra* note 2, the *CCA* allowed and still allows certain uses that would otherwise constitute copyright infringement, based on the purpose and effect of the use, for example, the fair dealing provisions (*CCA*, *supra* note 2, ss 29-29.2) and the exceptions to copyright infringement that apply to certain uses of computer programs (*CCA*, *supra* note 2, s 30.6).

¹⁶¹ The exclusive rights of copyright holders are still based on the exclusive right to authorize certain acts: *CCA*, *supra* note 2, ss 3, 15, 18, 21, 26.

¹⁶² I.e., given that the non-commercial purpose of a transaction is the starting point from which to determine whether an individual's transaction falls within the scope of consumer protection law. In the context of copyright, the distinction between non-commercial and commercial purpose of acts performed on copyright works is present to some extent to determine copyright infringement, but is not necessarily a determining factor, as discussed above in Part IV of this chapter.

¹⁶³ Whether the use is commercial or not also has important ramifications on the theoretical justifications that support copy ownership, as I discuss below in Chapter 6 Part III.

¹⁶⁴ See the discussion above in Part III of this chapter.

¹⁶⁵ For example, a consumer who on a website makes available for download, for free, entire copies of copyright works without the authorization of copyright holders. File sharing would also fall in that category.

copyright.¹⁶⁶ Yet, the non-commercial purpose that distinguishes consumers in consumer protection law from other individuals is a starting point to locate their rights and interests within the framework of copyright law.

Having presented the motivations and advantages of focusing my research on copyright consumers' rights within the larger group of copyright users, I have applied consumers' key characteristics as defined in consumer protection law statutes to the copyright law framework as a first step to carve out a space for consumers within copyright law. Consumers' key characteristics, i.e., individuals acting in a personal capacity and not for business purposes, are factors that are increasingly relevant to distinguish permitted acts from infringing acts in copyright law and should serve as a starting point to define consumers' rights and permitted uses of copyright works. The next step is to refine the understanding of the place of consumers within the copyright law framework by looking at copyright consumers in all corners, through the goals and aspirations they pursue with copyright works, asking which of those goals copyright law should promote.

V. Copyright consumers in all corners

A greater attention to consumers within the copyright law design requires an understanding of their aspirations and interactions with copyright works. Commentators, including Liu, Cohen, and Elkin-Koren, each reflect upon various types of copyright users and consumers in an attempt to situate their role and participation within the copyright framework.¹⁶⁷ They also define those users' needs and aspirations in the digital environment to which the judiciary and lawmakers should devote their attention.¹⁶⁸

¹⁶⁶ For example, a representative of a company may purchase copyright works to be used in a commercial context without such use necessarily interfering with the exclusive economic rights of copyright holders.

¹⁶⁷ *Supra* notes 61-63. See also Matthew Rimmer, *Digital Copyright and the Consumer Revolution – Hands off My iPod*, (Cheltenham, Northampton: Edward Elgar Publishing Limited, 2007) "Introduction," where the author describes three main categories of copyright consumers: (i) citizens, commoners, gleaners; (ii) bricoleurs, parodists, and amateurs, and (iii) consumers as user addicts (i.e., the law and technology movement).

¹⁶⁸ *Ibid.*

At one end of the spectrum, Liu, Cohen, and Elkin-Koren all refer to the passive consumers who treat copyright works as any other commodity.¹⁶⁹ They read books, watch movies, listen to a CD. Liu argues that copyright law responds to this type of consumer “by ensuring that conditions exist for a functioning market in copyrighted works, i.e., by making sure there are works for them to consume.”¹⁷⁰ Beyond that, there is little interest in the types of uses the passive consumer makes,¹⁷¹ which explains the relative little interest in those consumers on the copyright law radar screen.¹⁷²

At the other end of the spectrum, Liu and Elkin-Koren describe the “consumer-author” as the most active type of user.¹⁷³ Given that the primary focus of copyright law is to protect the creation of works, consumer-authors have traditionally received more attention than other copyright users. Copyright law has long recognized, to varying degrees, the legitimacy of the reuse of existing copyright works by other creators, through, *inter alia*, the doctrine of fair dealing and fair use,¹⁷⁴ the idea/expression dichotomy,¹⁷⁵ and the “non-substantial part” doctrine with respect to copyright works.¹⁷⁶ Recent amendments to the *CCA* give an even greater place than ever before to *user-authors*.¹⁷⁷ As Elkin-Koren points out, the recognition of *user-authors* is of only a small part of users within the broader range of possible experiences of copyright works.¹⁷⁸

¹⁶⁹ Liu 2003, *supra* note 67, refers to the “passive consumer”; Cohen 2005, *supra* note 66 at 348, refers to the “economic user”, i.e., “the one who enters the market with given set of tastes in search of the best deal”; Elkin-Koren, *supra* note 68 at 1138 refers to the “consumer-shopper.”

¹⁷⁰ Liu 2003, *supra* note 67 at 402-403.

¹⁷¹ *Ibid.*

¹⁷² Elkin-Koren, *supra* note 68 at 338.

¹⁷³ Liu 2003, *supra* note 67 at 404-405; Elkin-Koren, *supra* note 68 at 1139; Cohen 2005, *supra* note 66 at 348, refers to the more active user as the “romantic user.” The user-author is the one that Drassinower focuses on in “Taking User Rights Seriously”, Drassinower 2005, *supra* note 39 at 479, where the author associates “user rights” with the dignity of authorship itself, and links the fair dealing provisions or “user rights” analyzed in *CCH* to the threshold of originality. He argues that they are continuous, and emphasizes the “intertextuality of creation”: *ibid* at 472.

¹⁷⁴ I discuss fair dealing and fair use in Chapter 3 Part II C.

¹⁷⁵ I.e., the fact that copyright protects the expression of ideas in a work, not the ideas as such. See: Liu 2003, *supra* note 67 at 405; Elkin-Koren, *supra* note 68 at 1138.

¹⁷⁶ See the discussion on the non-substantial-part right in Chapter 3 Part II A.

¹⁷⁷ *CCA*, *supra* note 2, s 29, where education, parody, or satire were added as allowable purposes under the fair dealing provisions, with the entry into force of the *CCMA*, *supra* note 6. See the discussion on fair dealing and fair use in Chapter 3 Part II B. Also the introduction in the *CCA*, *ibid*, in 2012 of the non-commercial user-generated content exception to copyright infringement also gives more rights to user-authors: see the discussion in Chapter 3 Part II D (i)

¹⁷⁸ Elkin-Koren, *supra* note 68 at 1139.

In *Bell Canada*, the Supreme Court recently held that allowing consumers to preview excerpts of music online was a fair dealing for the purpose of research.¹⁷⁹ In doing so, the Court emphasized that research did not have to be for creative purposes to fall under the fair dealing provisions.¹⁸⁰ While fair dealing facilitated the use of pre-existing works for the creation of new works of authorship, the Court emphasized that one of the objectives of the *CCA* was also to encourage the dissemination of works and that it was in the public interest to encourage research with or without creative acts.¹⁸¹

In the same vein as the Supreme Court's recognition in *Bell Canada* that uses of copyright works without immediate creative output were also an integral part of the objectives promoted by the *CCA*, commentators seeking to define the place of users in copyright law point to the need to promote the significance of non-creative uses within the copyright framework. The type of users that Liu, Cohen, and Elkin-Koren believe deserve more attention by the judiciary and by lawmakers is somewhere in between the "consumer-author" and the passive user. For Liu, the "active consumer" encompasses a broad range of interests that have been overlooked by traditional copyright law: autonomy, the need to create and share, and creative self-expression.¹⁸² Cohen refers for her part to the "situated user" as one:

who appropriates cultural goods found within her immediate environment for four primary purposes: consumption, communication, self-development, and creative play. The cumulative result of this behaviour by situated users, and of both planned and fortuitous interactions among them, produces what the copyright system names, and values, as "progress."¹⁸³

Cohen reviews each of the four aspirations of the "situated user" and the extent to which current copyright laws fail to address them.¹⁸⁴ In doing so, Cohen reveals a more complex understanding of the process of "progress," the constitutional protection objective behind copyright in the US.¹⁸⁵ For Cohen, the situated user plays a role as important to the engine of progress as the incentive to authors to create:

¹⁷⁹ *Bell Canada*, *supra* note 1 at paras 11-49. As a result, it did not require the authorization of the copyright holders and hence did not trigger the payment of a royalty fee to SOCAN, the entity responsible for the collective administration of copyright in that case.

¹⁸⁰ *Ibid* at para 21.

¹⁸¹ *Ibid*.

¹⁸² Liu 2003, *supra* note 67 at 406ff.

¹⁸³ Cohen 2005, *supra* note 66 at 370.

¹⁸⁴ Cohen 2005, *supra* note 66 at 370ff.

¹⁸⁵ US Const art I, § 8: "The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Scholars and judges confidently speak of inducing creativity and discouraging slavish imitation, as if the two could be neatly separated. But if these practices are understood not only as related but as together comprising the very stuff of “progress,” it becomes harder to envision the former without the latter.¹⁸⁶

The idea of the central place of personal uses of copyright to the engine of progress is also present in the works of Tussey,¹⁸⁷ Litman,¹⁸⁸ Elkin-Koren,¹⁸⁹ and others.¹⁹⁰ For Elkin-Koren, consumers do not need to be “user-creators” to be integral participants of progress.¹⁹¹ Elkin-Koren refers to them as “consumer-as-participants,” the ones who make uses of works for their personal benefit alone, but who through this self-consumption also take part in creative process through “meaning-making” processes.¹⁹²

The view that copyright users are as much a part of innovation and progress as creators is not shared by all.¹⁹³ This may be attributable to a narrower view of consumers and of their uses and aspirations with respect to copyright works, i.e., the consumptive type of uses that “concern(s) convenience, rather than creativity; access to works of authorship, rather than incentives to produce them.”¹⁹⁴ It reflects the tension between different perspectives about the objectives of copyright law and, as a result, about the place of copyright users within the copyright house.¹⁹⁵ As I argued above in this chapter, to ignore the rights and interests of copyright users in the current digital environment, as it continues to evolve, is done at the expense of a robust, coherent, and credible copyright system, leading to more fundamental questions about its legitimacy.¹⁹⁶

As I define copyright consumers’ rights to copyright works, I will take into considerations all consumers on the spectrum in all corners, from the more passive consumers to the more active ones, i.e., the

¹⁸⁶ Cohen 2005, *supra* note 66 at 373.

¹⁸⁷ Tussey, *supra* note 72 at 1175-1177.

¹⁸⁸ See Litman 2007, *supra* note 60 at 1879: “copyright law was designed to maximize the opportunities for non-exploitative enjoyment of copyrighted works in order to encourage reading, listening, watching, and their cousins.” The author argues that these acts are “both deeply embedded in copyright’s design and crucial to its promotion of the ‘Progress of Science’.”

¹⁸⁹ Elkin-Koren, *supra* note 68 at 1139.

¹⁹⁰ Mark S. Nadel, “How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing” (2004) 19 BTLJ 785.

¹⁹¹ Elkin-Koren, *supra* note 68 at 1139, referring to the US Constitution, art 1 s 8, which confers to Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

¹⁹² *Ibid.*

¹⁹³ See, for example, Ginsburg 1997, *supra* note 99 at 3-4.

¹⁹⁴ *Ibid.*

¹⁹⁵ See the discussion in Part III of this chapter. See also the discussion in Chapter 6 Part III on the theoretical justifications of copyright and the rights to commercial copies of copyright works.

¹⁹⁶ See the discussion in Part III of this chapter.

consumer-authors. Greater attention needs to be given to consumers in the middle, described by Elkin-Koren as *consumers-as-participants* and similarly by other commentators, because in my view they describe more adequately the interaction and aspirations that broad range of copyright consumers increasingly have with respect to copyright works in a digital environment.¹⁹⁷ The discussion on the theoretical justifications of copyright and copy ownership in Chapter 6 is essential to further understand the place that users should have within the copyright design and why particular attention to the *consumer-as-participant* is necessary.¹⁹⁸

At a more fundamental level, all copyright consumers, from the more passive to the consumer-author, share a vulnerability that needs to be of particular concern to the copyright law design and underlying objectives. Elkin-Koren argues in the context of copyright, that consumers of “cultural artefacts” may require even more attention than the consumer of mundane commodities:

Cultural artefacts are not simply useful commodities. While they often have an entertainment value that could be quantified, they also possess a communicative value and a symbolic significance. They engage our minds in a more direct and intimate way than do mundane commodities and, therefore, expose consumers to a higher risk of deeper and more intrusive restrictions of freedom. This particular vulnerability of information consumers is often overlooked.¹⁹⁹

From this perspective, copyright consumers share vulnerabilities that are distinct from other copyright users and even greater than consumers in general. This particular vulnerability of copyright consumers indicates the need for attention over and above the one that is already given under consumer protection law.²⁰⁰ It points toward the need for a particular attention to consumers within the design of copyright law itself.

VI. Conclusion

While Canada may be the champion of copyright users as a result of the Supreme Court’s jurisprudence on the need to balance competing interests in the *CCA* beyond the exclusive rights of copyright holders, and its affirmation that exceptions to copyright infringement are users’ rights, copyright law in Canada and

¹⁹⁷ See the discussion in Chapter 1 Part I.

¹⁹⁸ See the discussion in Chapter 6 Part III.

¹⁹⁹ Elkin-Koren, *supra* note 68 at 1136-1137.

²⁰⁰ See the discussion above in Part IV of this chapter on the differences between copyright consumers and copyright users. See also the theoretical justifications for the protection of consumers under consumer protection law in Chapter 10.

worldwide still offers a fragmented view of copyright users. A lack of attention to copyright users or, even worse, keeping them outside the framework of copyright law is increasingly damaging to this group and to the viability of the copyright system given the pressures brought on by the digital environment. There is a discernable movement in Canada and worldwide, through recent legislative and judicial developments, toward a greater attention to users. In that thread, I argued that there is merit in looking at various subgroups of copyright users and, in particular, at copyright consumers. *Consumers* as they are defined in consumer protection law present distinctive characteristics that are highly relevant to how copyright law should apply to them. While the amendments to the *CCA* brought a greater recognition to the specificity of individuals performing acts for personal purposes when distinguishing permitted acts from infringing acts, the *CCA* is still predominantly structured on an act-based framework to determine copyright infringement. This act-based framework to determine copyright infringement increasingly sits uncomfortably in the digital environment and with the rights and interests of copyright consumers. Emerging theories of copyright users in doctrinal work help to better situate consumers in copyright law through understanding their goals and aspirations, and which of those goals copyright law should promote, from *passive consumers* to *consumer-authors*. While my research looks at all consumers on the spectrum, specific attention will be given to the ones in the middle²⁰¹ because of the relatively limited attention that they have been receiving in copyright law, and because they increasingly represent a large segment of consumers in the digital environment. While these consumers may less prominently fall under the objectives of copyright to promote and protect the creation of new works than *consumer-authors* do, they form no less part of the broader objectives of copyright law and policy to promote the progress of science and knowledge.²⁰²

Copyright consumers and their place within copyright law are starting to take form. They purchase copies of copyright works for personal purposes and not for commercial purposes. They are moderately active and their interactions with copyright works vary from ones that do not generate immediate creative outputs but are no less deserving of promotion and protection than the ones that engender more concrete creative outputs. How does copyright law treat these consumers? What acts can they perform on copies of copyright works without the authorization of copyright holders? This is what I explore in the next chapter.

²⁰¹ I.e., “consumers-as-participant,” “active consumers,” or “situated users” as defined in doctrinal works on copyright users: see the discussion above in Part V of this chapter.

²⁰² See the discussion in Part V of this chapter. See also the discussion on the theoretical justifications of copyright and copy ownership in Chapter 6 Part III.

Chapter 3

The So-Called Users' Rights

I. Introduction

In the previous chapter, I described how copyright users and consumers have traditionally been absent from copyright discourse. While the changing dynamics within copyright law in Canada and elsewhere are progressively altering this course, and copyright users are receiving more attention, they are still largely undefined in Canada's *Copyright Act* [CCA]¹ and similar copyright laws worldwide. In this chapter, I investigate the state of copyright consumers through the relevant users' rights that are conferred on them through the CCA, with reference to other jurisdictions.² What is the nature and scope of those rights and how do they relate to one another? How can they be altered through the commercialization of copies of copyright works, e.g., through contracts and technological protection measures [TPMs]? More fundamentally, are they rights at all? Through this exercise, I draw a sharper image of the contemporary state of copyright consumers by laying out what the CCA as supplemented by contracts allow them to perform on copies of copyright works they lawfully acquire and how they constrain copyright consumers.

The consumers of my study access copyright works that are *outside the public domain*: they perform commercial transactions with respect to works of authorship (e.g., musical works, books, computer programs, or films) that benefit from the term of protection granted by the CCA.³ At this point, I do not discuss the suitability of the term of copyright as it is set out in international conventions and in the CCA.⁴ Moreover, the underlying assumption is that the copyright works relevant to consumer transactions comply with the originality requirements for protection under

¹ RSC 1985, c. C-42.

² I.e., the US, EU, UK, and France.

³ The relevant works of this study are works of authorship that benefit from protection under the CCA, *supra* note 1, i.e., "original literary, dramatic, musical or artistic works" that are protected by the applicable terms of copyright at the time the consumer gains access to the works: *ibid*, ss 5-6.

⁴ Discussions on the suitable term of copyright require an analysis of the nature and theoretical justifications of copyright: see Chapter 5 and Chapter 6 Part III. I refer to recommendations for copyright reform that include shorter terms of protection of copyright works in Chapter 12 Part IVA.

the *CCA*.⁵ The term of copyright and originality requirements are part of broader copyright framework issues that involve assessing the appropriate level of protection and the scope of the public domain that we should preserve.⁶ The public domain/interest arguments that withstand the exceptions to copyright infringement that I examine here may assist in understanding the nature and scope of the exceptions.⁷ As I discussed in Chapter 2, public interest arguments are not always well suited for addressing the specificity of copyright consumers.⁸ In the same vein, specific copyright consumers' issues, i.e., the ones that concern a commercial transaction between consumers and copyright holders and the competing rights and interests of each party with respect to the same objects, i.e., the copyright works, are likely to be addressed only incidentally or to get lost in broader public domain/interest discussions.⁹

In Part II, I present the *CCA*'s user rights that may be relevant to copyright consumers in addition to the traditional unlimited powers and privileges to read, play, and view the copies that users own: the non-substantial part, the private copying regime, fair dealing, the four new user provisions recently introduced in the *CCA*, the exhaustion or first sale doctrine and permitted acts relating to computer programs, and other permitted acts. In Part III, I analyze the interplay between these rights and the possibility of their alteration or eradication by non-negotiated standard end-user agreements and TPMs. To this end, I refer to selected non-negotiated standard

⁵ *CCA*, *supra* note 1, s 5; For the test of originality under Canadian copyright law, see: *CCH Canadian Ltd. v Law Society of Upper Canada* 2004 SCC 13 at paras 14ff.; see also David Vaver, *Intellectual Property Law Copyright, Patents, Trade-Marks*, 2d ed. (Toronto: Irwin Law, 2011) [Vaver, *Intellectual Property Law 2011*] at 100ff.

⁶ The doctrines and chore principles within copyright law that are frequently invoked in relation to the preservation of the public domain include the subject matter of copyright and the concept of originality, the scope of the exclusive rights conferred, the term of protection and copyright exceptions and limitations, including the non-substantial-part doctrine. See Thomas Dreier, "Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?" in Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First, eds, *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001) 295 at 303-309. See also Giuseppina D'Agostino, "Copyright Exceptions and Limitations and Copyright Board of Canada" in ALAI Canada, ed, *The Copyright Board of Canada; Bridging Law and Economics for Twenty Years* (Cowansville, Que: Yvon Blais, 2011) 195 [D'Agostino, "Copyright Exceptions and Copyright Board"] at 197-198. For a discussion on the concept of public domain and copyright in a Canadian context see Carys J. Craig, "The Canadian Public Domain: What, Where, and to What End?" 7 *Canadian Journal of Law & Technology*, 221.

⁷ For example with respect to the non-substantive part exception to copyright infringement. See also the discussion in Part II A of this chapter.

⁸ See the discussion in Chapter 2 Part II.

⁹ *Ibid.*

end-user agreements for the online distribution of books, musical recordings, and films.¹⁰ The analysis that I present in Part II and Part III lead me to question their nature as rights in Part IV. To localize consumers' rights further, I examine the relevant international copyright obligations in Part V and how they may influence present and future users' rights. I conclude that most users' rights are not particularly relevant to consumers and that they were not designed with consumers in mind.¹¹ Even for those rights that are more specifically geared toward copyright consumers, they tend to be narrow in scope and their applicability is sometimes subject to TPMs.¹² Overall, the nature as rights of the user provisions examined here is questionable and their mandatory nature is uncertain for some and unlikely for others.

II. What acts can copyright consumers perform without the authorization of copyright holders?

Copyright consumers and other users cannot perform acts that are exclusively reserved to copyright holders on protected works,¹³ unless they obtain their authorization or unless the *CCA* explicitly permits copyright users to perform those acts. In Canada, *copyright* means the sole right to produce or reproduce the work in any material form, to perform the work in public, to publish the work, and other exclusive rights with respect to performers' performance, sound recordings and communication signals.¹⁴ Copyright also includes a non-exhaustive list of specific acts such as the exclusive right to communicate a dramatic or musical work to the public, or to rent a computer program or a sound recording embedding a musical work.¹⁵ Outside the acts exclusively reserved to copyright holders, ownership in copies of copyright works has been traditionally viewed as conferring unlimited powers and privileges to use the copy in any other manner, including the unlimited right to play, view, read, and listen to the work.¹⁶ Through the

¹⁰ See my review of selected non-negotiated standard end-user agreements in Part III C of this chapter.

¹¹ This is particularly the case of the non-substantial-part right and fair dealing: see the discussion in Part II A and C of this chapter.

¹² See the discussion in Part II D of this chapter.

¹³ Copyright protects "every original literary, dramatic, musical or artistic works" for a specific term: *CCA*, *supra* note 1, ss 5-6.

¹⁴ *CCA*, *supra* note 1, ss 2, 3, 15, 16, 18, 21, 26.

¹⁵ *CCA*, *supra* note 1, s 3.

¹⁶ *Théberge v Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 [*Théberge*] at para 31, as Binnie J. stated for the majority: "Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it." Joseph P. Liu, "Owning Digital Copies:

combination of various factors, the traditional unlimited privilege and power to play, view, listen, to or read commercial copies of copyright works distributed online with no physical supporting medium is under increased pressure.¹⁷ I will address this specific issue in Chapter 7.¹⁸

In this part, I investigate the scope of the exceptions to copyright infringement enumerated in the *CCA* and how they affect copyright consumers' rights to commercial copies of copyright works. Exceptions to copyright infringement apply either to a specific category of users,¹⁹ based on the purpose of the acts to be performed by users²⁰ or based on the nature of copyright works.²¹ I look at those permitted acts that are *a priori* relevant to copyright consumers in contrast with other users,²² starting with permitted acts with respect to non-substantial parts of copyright works.

A. Non-substantial part

Since the enactment of Canada's first copyright act, the *Copyright Act, 1921*,²³ copyright has been delineated by the exclusive right to produce or reproduce, perform in public or publish²⁴ the whole or *a substantial part* of the copyright work.²⁵ As a result, consumers can make any reproduction, performance in public, or publication of a *non-substantial part* of copyright works without the authorization of the copyright holders. Acts performed on non-substantial parts of copyright works are outside the realm of copyright holders' exclusive rights and can be performed

Copyright Law and the Incidents of Copy Ownership" (2001) 42 William and Mary Law Review 1245 at 1287.

¹⁷ Those factors include the scope of the exclusive right to authorize the reproduction of a work, the effect of technological protection measures and of non-negotiated standard end-user agreements for commercial copies of copyright works. See the discussion in Part III B and III C of this chapter, and the uncertainty around the characterization of those transactions as sales, licences, or service contracts: see the discussion in Chapter 8 Part II.

¹⁸ See the discussion in Chapter 7 Part III A (iii).

¹⁹ For example, educational institutions (*CCA, supra* note 1, ss 29.4 -30.04) or library, archives, and museums (ss 30.1-30.5).

²⁰ For example, under the fair dealing provisions (*CCA, supra* note 1, ss 29-29.2) or private copying (ss 79-88).

²¹ For example, permitted acts relating to computer programs (*CCA, supra* note 1, ss 30.6-30.61).

²² Such as educational institutions, library, archives, and museums: *CCA, supra* note 1, ss 29.4-30.04, 30.1-30.5.

²³ S.C. 1921, c. 24, s 3(1).

²⁴ If the work is unpublished: *CCA, supra* note 1, s 3(1).

²⁵ *CCA, supra* note 1, s 3(1).

without compensation to copyright holders and without infringing copyright.²⁶ Similar language exists in the UK *Copyright, Designs and Patents Act 1988* [UKCDPA],²⁷ while the French *Code de la Propriété intellectuelle* [CPI] refers to infringement occurring upon the complete or *partial* reproduction of the work.²⁸ In the US, the substantial similarity test to establish copyright infringement and the application of the *de minimis* principle to the doctrine of fair use embed similar concepts to that of the non-substantial part doctrine in Canadian copyright law.²⁹

The scope of the non-substantial part doctrine can be derived from a case-by-case judicial analysis. In its current form and scope, the non-substantial part doctrine is not likely to be of much assistance to copyright consumers for the reasons that I detail below. However, it provides important insights into the scope of copyright holders' exclusive rights and enlightens the understanding of other relevant exceptions to copyright infringement.³⁰ Commentators put forward suggestions to broaden the scope of the non-substantial part doctrine, suggestions that merit further consideration in a normative assessment of copyright and its effects on the community of copyright consumers and other users.³¹ There are also incidental instances where the non-substantial part doctrine may be relevant to copyright consumers. For these reasons, I will restrict my analysis of the non-substantial part doctrine by providing an overview of its main features and limitations for copyright consumers and of scholars' suggestions for improvement, as opposed to a detailed account of this doctrine.

²⁶ See David Vaver, *Copyright Law* (Toronto: Irwin Law Inc., 2000) [Vaver, *Copyright Law 2000*] at 143ff; McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed. (Thomson, Carswell: Toronto, 2003) ch. 21 at 14ff.

²⁷ c. 48, s 16 (3) (a).

²⁸ Art. L122-4 CPI.

²⁹ 17 USC § 106, which lists the exclusive rights of copyright holders, does not refer to the exclusive right to reproduce (and other acts) the work or a *substantial part*. For a review of the case law on these two applications of the *de minimis* principle in US copyright law, see Andrew Inesi, "A Theory of De Minimis and a Proposal for its Application in Copyright" (2006) 21 Berkeley Technology Law Journal, 945 at 960-969. The author describes that in the case of fair use, the *de minimis* principle applies principally to the fourth factor considered to establish fair use, i.e., "the effect of the use on the market for, or value of, the original work."

³⁰ For example, the application of the theory of property limitation rules to the non-substantial-part doctrine, by contrast to the fair dealing provisions, helps provide a better understanding of the nature of copyright and of copyright users' rights: see the discussion in Chapter 7 Part III.

³¹ For example see Alan L. Durham, "Consumer Modification of Copyrighted Works" (2006) 81 Ind. L.J. 851, at 875-878, and the discussion further below in Part II A of this chapter.

There are at least three reasons why the non-substantial part doctrine, in its current scope, is of limited assistance to consumers who lawfully acquire copies of copyright works. The first one relates to the legal nature of the permitted use of a non-substantial part of a copyright work. As the *CCA* is silent on what may or may not constitute the substantial part of a work, the scope of a substantial part of a work is essentially determined by judicial interpretation. Timothy Endicott and Michael Spence consider this legal design as generally desirable for the functioning of the substantial part of a work when defining the scope of copyright, because, *inter alia*, precision may not be possible and lead to arbitrariness, while vagueness gives leeway to parties to negotiate licensing terms acceptable to both parties.³² This legal design is less desirable in a consumer context where there is typically no negotiation on terms of use. The legal protection of consumers tends to favour the codification of legal doctrines over the common law for more legal certainty, perhaps at the expense of flexibility.³³

Second, the current scope of the permitted use is fairly restrictive in its application. The judicial test to determine substantiality tends to be more qualitative than quantitative, although both aspects are considered.³⁴ The reproduction of even a small portion of the work can amount to a substantial part. In the earlier landmark judgment *Hawkes v. Paramount Film Services*,³⁵ the reproduction of a portion of the plaintiff's musical work i.e., March Colonel Bogey,³⁶ in a film by the defendant at the opening of a school in the presence of the Prince of Wales, was held to amount to a substantial part of the plaintiff's work.³⁷ Ringtones have been considered to be a

³² Timothy Endicott & Michael Spence, "Vagueness in the Scope of Copyright" (2005) 121 *Law Quarterly Review* 657 at 661, 663-664.

³³ I discuss the scope and application of consumer protection law to copies of copyright work in Canada with reference to other jurisdictions (i.e., US, EU, UK, and France) in the Third Part of my thesis (Chapter 8 to 11). See in particular the discussion in Chapter 9 and 10.

³⁴ *Édutile Inc. v Automobile Protection Assn.*, [2000] 4 F.C. 195 (FCA), paras 22-23, where the Federal Court of Appeal stated: "To determine whether a 'substantial part' of a protected work has been reproduced, it is not the quantity which was reproduced that matters as much as the quality and nature of what was reproduced . . ."; *U & R Tax Services Ltd v H & R Block Canada Inc* (1995) 62 C.P.R. (3d) 257 at 268.; *Cie générale des établissements Michelin-Michelin & Cie v C.A. W. – Canada* (1996), 71 C.P.R. (3d) 348, 124 F.T.R. 192, [1997] 2 F.C. 306 (T.D.) at para 343; *Century21 Canada Ltd. Partnership v Rogers Communications Inc.*, 2011 BCSC 1196 at paras 184,194,199,201,203; *Warman v Fournier*, 2012 FC 803 at paras 23-28.

³⁵ (1934) 1 CH. 593 (C.A.).

³⁶ More precisely: 28 bars or 50 seconds: *Ibid.*

³⁷ *Ibid.*

substantial part of musical or dramatico-musical works and have been subject to tariffs in the past.³⁸

Given the current restrictive interpretation of what is a non-substantial part of a copyright work, the uses that the non-substantial-part doctrine could permit are, for practical reasons, of limited assistance to consumers who lawfully acquire copies of copyright works. Consumers' uses of the copies of copyright works they acquire generally pertain to the works as a whole rather than portions of it. The non-substantial part doctrine, as an exception to copyright infringement, could be relevant to some consumer uses of lawfully acquired copyright works. For instance, consumers who create new copyright works and who integrate a portion of a pre-existing copyright work they lawfully acquired into their newly created work could invoke the non-substantial part exception to copyright infringement. However, the recent introduction in the *CCA* of the permitted use of copyright works without copyright holders' consent for non-commercial user-generated content is likely to cover that scenario to a large extent.³⁹ The new non-commercial user-generated content exception to copyright infringement minimizes the practical appeal of the non-substantial-part doctrine for consumers with respect to the reuse of pre-existing works in the creation of new works because it sets out more clearly the acts that consumers can perform on pre-existing works than does the non-substantial-part doctrine.⁴⁰

Third, the language of the *CCA* links the determination of a substantial part to the work itself rather than to the nature, scope, and purpose of copyright holders' rights, although such elements are also considered in the factual analysis to determine whether an act has been performed with

³⁸ *Socan Tariff 24 (Ringtones) 2003-2005*, (Copyright Board of Canada 18 August 2006), online: <http://www.cb-cda.gc.ca/decisions/2006/20060818-m-f.pdf>. The Federal Court of Appeal deferred to the interpretation of the Copyright Board of what constitutes a "substantial part" in *Canadian Wireless Telecommunications Assn. v Society of Composers, Authors and Music Publishers of Canada* 2008 FCA 6. The tariff applicable to ringtones and ringbacks for the period between 2006-2013: *Tariff No. 24 Ringtones and Ringbacks* (2006 to 2013), Supplement Canada Gazette, Part I, June 30, 2012, is presently under review by the Copyright Board for its application for the period subsequent to November 7, 2013: *Public Performance of Musical Works Re*, Copyright Board (2013), online: <http://www.cb-cda.gc.ca/home-accueil-e.html>, para 17. In light of two judgments by the Supreme Court: *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, and *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 and the coming into force of Canada's *Copyright Modernization Act*, S.C. 2012, c. 20, the issue is whether ringtones still involve communications to the public by telecommunication on which Tariff 24 is based.

³⁹ I discuss this exception to copyright infringement in Part II D (i) of this chapter.

⁴⁰ *Ibid.*

respect to a substantial part of a work.⁴¹ The reference to a substantial *part* of the work in the *CCA* may be more constraining in application and less conducive than other exceptions to copyright infringement to maintaining the balance between competing interests with respect to the scope of protection of copyright works.⁴² It falls under the act-based approach to copyright holders' exclusive rights and copyright infringement that is reflected in the *CCA*'s enumeration of the exclusive rights of copyright holders,⁴³ as opposed to the more purpose-based approach that is reflected in fair dealing and other exceptions to copyright infringement.⁴⁴

Commentators argue in favour of an interpretation of the substantial part that looks more directly at the purpose of copyright and at the effects of the acts performed on the work on the exclusive rights of copyright holders.⁴⁵ In the US context, one argument is that the *de minimis* exception to copyright infringement should apply to private uses made by consumers in cases where the act is performed on the entirety of the work but the effect on copyright holders' rights is trivial.⁴⁶ In other words, the *de minimis* or non-substantial-part analysis would shift from the quantity and quality of the work used to the effects on copyright holders' exclusive rights. Such an interpretation is more promising to consumers than the current scope of the non-substantial-part

⁴¹ *CCA*, *supra* note 1, s 3(1). In *U & R Tax Services Ltd. v H & R Block Canada Inc.*, *supra* note 34, Richard J. listed the factors to consider to assess whether acts were performed on a substantial part of a copyright work, which included, in addition to the quality and quantity of the material taken, "(b) the extent to which the defendant's use adversely affects the plaintiff's activities and diminishes the value of the plaintiff's copyright; and (d) whether the defendant intentionally appropriated the plaintiff's work to save time effort; ...". The same factors were applied by Reed J. in *Hager v ECW Press Ltd.* (1998) 85 C.P.R. (3d) 289 (Fed. T.D.). See also Endicott & Spence, *supra* note 32 at 671, who propose four factors to consider to determine whether a substantial part of a work was used in the case of literal copying that should focus on the effects of the use on the exclusive rights of copyright holders as well as on the expressive acts and other objectives pursued by the users.

⁴² The need for the *CCA*, *supra* note 1 to preserve a balance between competing interests was stated by the Supreme Court of Canada on numerous occasions: *Théberge*, *supra* note 16 at para. 30 and reiterated in *CCH*, *supra* note 5 at para 10; *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, 2004 SCC 45 at para 40; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 at para 9; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, *supra* note 38 at para 7; *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, *supra* note 38 at para 40; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at para 64. For a discussion on the concept of balance in Canadian copyright law, see Chapter 2 Part II.

⁴³ I.e., *CCA*, *supra* note 1, ss 3(1), 15, 18, 21, 26.

⁴⁴ *CCA*, *supra* note 1, ss 29-29.2; see also the discussion on the four new user provisions in Part II D of this chapter.

⁴⁵ For example see Durham, *supra* note 31 at 875-878.

⁴⁶ *Ibid.*

doctrine under Canadian copyright law.⁴⁷ For such permitted uses, consumers need to turn to the other exceptions to copyright holders' exclusive rights that I explore below in this chapter.⁴⁸

The non-substantial part doctrine ties in to the broader discussion on the application of the generally accepted interpretative principle *de minimis non curat lex* (i.e., "the law does not concern itself with trifles")⁴⁹ in copyright and intellectual property law. David Vaver points to the need to develop criteria for its application similar to those used in other areas of the law.⁵⁰ In a US context, arguments are put forward to expand the doctrine of *de minimis* beyond its traditional uses in the application of the fair use and substantial similarity doctrines, to counter increasing controls that copyright holders have on their works as a result of technological innovations.⁵¹

The role that the non-substantial part doctrine can play with respect to copyright consumers is fairly limited given the current state of Canadian copyright law. Commentators' pleas for its expansion from a qualitative or quantitative analysis, toward a purpose-based and effects of the use analysis, reflect the increasing malaise that arises from the current act-based structure of copyright holders' exclusive rights in an era where copyright consumers are increasingly technologically enticed to perform multiple acts on copyright works that will enhance their overall experience.⁵² Until the non-substantial-part doctrine moves away from the current quantitative and qualitative analysis toward the purpose and effects of the use, its application remains of limited interest to copyright consumers.

Acts by consumers that involve substantial parts of the copyright work may still be performed without the authorization of copyright holders if they fall under permitted uses or pertain to

⁴⁷ See the discussion above in Part II A of this chapter.

⁴⁸ I.e., the private copying regime, the fair dealing provisions, the four new user provisions, and the computer program permitted uses: see Part II B to E of this chapter.

⁴⁹ *Ontario v Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (SCC) at para 65, where the Court analogized this maxim with interpretation principles that seek to rule out absurdity.

⁵⁰ Vaver, *Intellectual Property Law 2011*, *supra* note 5 at 687, where the author points to the criteria that are applied in criminal cases: "One would look at the specific purpose of the statutory provision in question, the interests they incurred, how far a decision either way would encourage desirable or undesirable behaviour, and generally how the public interest is affected."

⁵¹ Andrew Inesi, *supra* note 29. See also Christopher M. Newman, "Transformation in Property and Copyright" (2011) 56 *Villanova Law Review* 251 at 299-300 where the author criticizes the effects of a narrow application of *de minimis* in the substantive similarity doctrine.

⁵² I discuss the limitations of the act-based approach to determine copyright infringement, as opposed to a purpose- and effect-based approach in Chapter 2 Part IV.

specific forms of copyright works. The private copying regime and its significance to copyright consumers is the exception to copyright infringement that I explore next.

B. Private copying regime

The private copying regime in the *CCA* is an exception to copyright infringement that allows consumers to reproduce sound recordings and certain copyright works embodied in sound recordings⁵³ onto an “audio recording medium”⁵⁴ for the private use of the person who makes the copy.⁵⁵ This permitted use applies to one specific type of copyright works purchased by consumers, i.e., sound recordings of musical works (including performers’ performance of musical works),⁵⁶ and does not apply to other works protected by copyright, such as films or books. There is no limit imposed on the number of copies made, nor does the *CCA* limit reproduction solely for the copier’s use.⁵⁷ A similar regime exists in the US.⁵⁸ In France, the right to make private copies is not limited to audio works and applies to most forms of copyright works.⁵⁹ There is no specific private copying regime or right to make copies for private purposes in the UK.⁶⁰

⁵³ More precisely: a musical work embodied in a sound recording, a performer performance of a musical work embodied in sound recording, or a sound recording in which a musical work, or a performer’s performance of a musical work is embodied: *CCA*, *supra* note 1, s 80(1).

⁵⁴ “Audio recording medium” is defined in the *CCA*, *supra* note 1, s 79. The approved tariff for private copying for the year 2011: *Private Copying Tariff, 2011* (Copyright Board of Canada, December 18, 2010), online: <http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/copying-copie-e.html>, s 2, defines “blank audio recording medium” as “(a) a recording medium, regardless of its material form, onto which a sound recording may be reproduced, that is of a kind ordinarily used by individual consumers for that purpose and on which no sounds have ever been fixed, including recordable compact discs (CD-R, CD-RW, CD-R Audio, CD-RW Audio); and (b) any medium prescribed by regulations pursuant to sections 79 and 87 of the *Act*; (*support audio vierge*).”

⁵⁵ *CCA*, *supra* note 1, s 80(1). The *CCA* does not define “person” or “private use,” but this obviously includes consumers who perform those acts for non-commercial purposes: see s 80(2).

⁵⁶ More precisely: a musical work embodied in a sound recording, a performer performance of a musical work embodied in sound recording, or a sound recording in which a musical work, or a performer’s performance of a musical work is embodied: *CCA*, *supra* note 1, s 80(1).

⁵⁷ *CCA*, *supra* note 1, s 80. See Vaver, *Intellectual Property Law 2011*, *supra* note 5 at 261.

⁵⁸ 17 USC, §§ 1001–1010. The *Audio Home Recording Act*, Pub. L. 102-563, 106 Stat. 4237 (1992), which amended 17 USC in 1992.

⁵⁹ CPI, art L122-5 2° permits the making of copies of published copyright works strictly for private use and not collective use, with some exceptions applying to artistic works, computer programs, and electronic databases: “Les copies ou reproductions strictement réservées à l’usage privé du copiste et non destinées à une utilisation collective, à l’exception des copies des oeuvres d’art destinées à être utilisées pour des fins identiques à celles pour lesquelles l’oeuvre originale a été créée et des copies d’un logiciel autres que la

The permitted acts of consumers under the private copying regime are restricted. They do not extend to a reproduction for the purpose of sale or rental, to distribution of the musical recording, whether or not for the purpose of trade, communicating to the public by telecommunication,⁶¹ or to performing or causing to be performed in public.⁶² For example, as per subsection 80(2) of the CCA, uploading a musical recording from a CD to make it available on a file-sharing network would amount to a telecommunication to the public and hence not fall under the private copying exception to copyright infringement.⁶³ Moreover, the Federal Court of Appeal held in *Canadian Private Copying Collective v. Canadian Storage Media Alliance* that a permanently embedded or non-removable memory, incorporated into a digital audio recorder (MP3 player) was not an

copie de sauvegarde établie dans les conditions prévues au II de l'article L. 122-6-1 ainsi que des copies ou des reproductions d'une base de données électronique.”

⁶⁰ The Hargreaves Report, which was commissioned by UK Prime Minister in 2010: Ian Hargreaves, “Digital Opportunity, a Review of Intellectual Property and Growth” 2011, at 49 (para 5.31) recommended the introduction of a private copying regime that would apply to a broad range of copyright works: “The Government should introduce an exception to allow individuals to make copies for their own and immediate family’s use on different media. Rights holders will be free to pursue whatever compensation the market will provide by taking account of consumers’ freedom to act in this way and by setting prices accordingly.” See also, a Martin Kretschmer, “Private Copying and Fair Compensation: An Empirical Study of Copyright Levies in Europe, A report of the UK Intellectual Property Office” (2011), online: www.wipo.int/.../wipo_ip_econ_ge_1_12_ref_kretschmer.pdf. For a review of the private copying exception to copyright infringement in various jurisdictions in Europe, see Marco B.M. Loos, Natali Helberger, Lucie Guibault, Chantal Mak, Lodewijk Pessers, Katalin J. Cseres, Bart van der Sloot & Ronan Tigner, “Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts” (2011) University of Amsterdam, Centre for the Study of European Contract Law (CSECL), Institute for Information Law (IViR), Amsterdam Centre for Law and Economics (ACLE), online: http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm at 112-115.

⁶¹ In *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, *supra* note 42 at para 30, the Supreme Court confirmed the Copyright Board assessment of a “communication to the public”, i.e., when it is “made available on the Internet openly and without concealment, with the knowledge and intent that they be conveyed to all who might access the Internet [...] a communication may be to the public when it is made to individual members of the public at different times, whether chosen by them (as is the case on the Internet) or by the person responsible for sending the work (as is the case with facsimile transmissions).”

⁶² CCA, *supra* note 1, s 80(2).

⁶³ CCA, *supra* note 1, s 2.4 (1.1), which came into force on November 7, 2012. The scope of the exclusive right to communicate to the public by telecommunication on the internet raises several questions since the judgment by the Supreme Court *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 at paras 5ff., where the Court held in a 5 to 4 decision that the download of video games purchased on the Internet was not a communication to the public by telecommunication. The judgement was rendered prior to the entry force of CCA, *ibid*, s. 2.4 (1.1).

“audio recording medium” and therefore did not fall under the private copying exemption of the *CCA*.⁶⁴ This considerably limits the scope of the allowable private copying.⁶⁵

The definition of “audio recording medium” in the *CCA* requires that the recording medium⁶⁶ be “of a kind ordinarily used by individual consumers” for the purpose of reproduction.⁶⁷ In other words, consumer trends in relation to reproduction technologies are central to any determination of whether a recording medium can be the object of the levy.⁶⁸ Even though it acknowledged the evidence of the strong consumer trend of copying music on MP3, this was however not sufficient for the Federal Court of Appeal in the *Canadian Private Copying Collective* case to allow the private copying exception to copyright infringement to apply, on the basis of a technical interpretation of the relevant provisions of the *CCA*.⁶⁹ To remedy the void that this created, a new user provision was recently introduced in the *CCA*, i.e., the reproduction for private purposes, which I discuss below in this chapter.⁷⁰

The justification of the limited right granted to consumers to make copies of musical works for their own private use has been traditionally viewed as a mechanism to address an identified market failure.⁷¹ The private copying regime assumes that the ability to make copies for private purposes forms an integral part of the exclusive economic rights of copyright holders, but that they are unable to efficiently enforce their rights against private copying. In exchange for the

⁶⁴ 2004 FCA 424, [2004] F.C.J. No. 2115, [2005] 2 F.C.R. 654.

⁶⁵ *Ibid*, more specifically, the analysis in paras 133ff. In that case, the Court had to review the legality of a levy that the Canadian Private Copying Collective sought to impose on, among others, MP3 players. The Federal Court of Appeal overturned the decision of the Copyright Board by holding that devices such as MP3 players, where the recording memory was embedded in the apparatus and was not separable there from, did not fall under the definition of a “audio recording medium” and hence could not be the object of a levy under the *CCA*, *supra* note 1.

⁶⁶ I.e., one on which levies can be applied and hence the prescribed use of which by private parties is excluded from copyright infringement.

⁶⁷ *CCA*, *supra* note 1, s 79.

⁶⁸ On this basis, the Copyright Board has specifically excluded certain recording media from the scope of application of the levy system. For instance, it denied the Canadian Private Copying Collective the ability to establish a levy on recordable or rewritable DVDs, removable memory cards, and removable micro hard drives, on the basis that these media were not ordinarily used by individuals for the purpose of copying: Copyright Board Decision, December 12, 2003, at 42- 43, referred to in *Canadian Private Copying Collective v Canadian Storage Media Alliance*, *supra* note 64.

⁶⁹ *Supra* note 64.

⁷⁰ See Part II D (ii) of this chapter.

⁷¹ For example, see Sunny Handa, *Copyright Law in Canada* (Markham, Ontario: Butterworth Canada, 2002) at 466.

limited right given to consumers to make private copies, a levy is imposed on blank audio-recording media manufactured or imported in Canada. There is also a right of remuneration for various copyright holders.⁷² Copyright holders' inability and related inefficiencies to go after individual consumer infringers⁷³ is solved in part by the copyright levy created by the private copying regime.

The fundamental underlying assumption that supports the levy- remuneration-based Canadian private copying regime – is increasingly under attack at a normative level and as a result of recent legislative developments in Canada. At a normative level, the acts of reproduction for private use ought not necessarily form part of the exclusive economic rights of copyright holders, consequently, need not give rise to compensation. In the digital environment, the right to make copies for private purposes is increasingly justified on the basis of various interests that impose outer limits on the reach that copyright holders have to control uses of their copyright works by consumers.⁷⁴ The four new user provisions brought in by the recent amendments to the *CCA* confirm that approach.⁷⁵ Contrary to the compensation model that prevails under the current private copying regime, the four new user provisions allow individual users to perform certain acts without the authorization of copyright holders and do not give rise to remuneration to copyright holders.⁷⁶ These amendments signal an important shift in the treatment of uses of copies of copyright works by individuals for non-commercial or private purposes.⁷⁷

In essence, the private copying regime is limited to the reproduction of a musical recording on a blank CD or similar medium for private use. From the perspective of consumers of digital copyright works, the benefits of the private copying regime remain highly fragmented and of less and less relevance in the digital environment that includes the growth of multiple playing devices such as iPods and other forms of MP3 players. The recent amendments of the *CCA* and, in particular, the introduction of the four new user provisions allowing the reproduction for private

⁷² *CCA*, *supra* note 1, ss 81-82.

⁷⁴ See the discussion on the theoretical justifications for copy ownership in Chapter 6 Part III and on how copy ownership can limit the rights of copyright holders in Chapter 7 Part III.

⁷⁵ Canada's *Copyright Modernization Act*, S.C. 2012, c. 20 [*CCMA*] amended the *CCA*, *supra* note 1, by introducing s 29.21 (Non-commercial user-generated content), s 29.22 (Reproduction of private purposes), s 29.23 (Fixing signals and recording programs for later listening or viewing), s 2.23 (Backup copies).

⁷⁶ *Ibid.*

⁷⁷ I discuss each of the four new user provisions in Part II D (i) to (iv) of this chapter.

purposes of any type of work on any device owned by the individuals, will progressively supersede the application of the private copying regime in the *CCA*, even though for now the application of the private copying regime still prevails over the application of the reproduction for private purpose right.⁷⁸

C. Fair dealing

Fair dealing is an exception to copyright infringement under which users can perform acts with copyright works without the authorization of copyright holders for enumerated purposes, provided that the dealing is fair.⁷⁹ In the leading case *CCH Canadian Ltd. v. Law Society of Upper Canada* [*CCH*],⁸⁰ the Supreme Court qualified fair dealing to be “perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence,” adding that fair dealing and other exceptions to copyright infringement were users’ rights.⁸¹ The *CCA* lists the purposes for which copyright works may be used without the authorization of the copyright holder under the fair dealing exception. They are: research, private study,⁸² criticism, review,⁸³ news reporting,⁸⁴ and the recently introduced purposes of education, parody, or satire.⁸⁵ As an exception to copyright infringement, fair dealing applies when reserved acts are performed on a substantial part of a copyright work that may otherwise infringe copyright.⁸⁶ Acts that amount to fair dealing can be performed without compensation to copyright holders. Copyright users can invoke fair dealing even for acts that would be normally covered by one of the other exceptions of the *CCA*, including the private copying regime.⁸⁷ Other jurisdictions, including the UK, have similar fair dealing provisions in their laws,⁸⁸ while the US applies the doctrine of fair use, which as I discuss below in this Part, shares a resemblance with fair dealing but with important distinctions.⁸⁹

⁷⁸ *CCA*, *supra* note 1, s 29.22 (3).

⁷⁹ *CCA*, *supra* note 1, ss 29-29.2.

⁸⁰ *Supra* note 5.

⁸¹ *Ibid* at para 48.

⁸² *CCA*, *supra* note 1, s 29.

⁸³ *CCA*, *supra* note 1, s 29.1.

⁸⁴ *CCA*, *supra* note 1, s 29.2.

⁸⁵ *CCA*, *supra* note 1, s 29.

⁸⁶ I.e., a non-substantial part does not give rise to copyright infringement: see the discussion above in Part II A of this chapter.

⁸⁷ *CCH*, *supra* note 5 at para 49. I discuss consumers’ rights under the private copying regime in Part II B of this chapter.

⁸⁸ *UKCDPA*, *supra* note 27, ss 29-30.

⁸⁹ 17 USC § 107.

Fair dealing/fair use captures the imagination by its mere appellation. It has entered common parlance: lay people who have a limited knowledge of copyright will often invoke the concept of fair use and fair dealing, and will assume that it allows them to perform a wide variety of acts with copies of copyright works without the authorization of copyright holders. To what extent is fair dealing (and, at a different level, fair use) helpful and relevant for consumers who lawfully access copies of copyright works, in strengthening the permitted scope of their use? As I argue in this part, a closer look at fair dealing and to some extent fair use reveals a much less promising legal tool to assert consumers' rights to copies of copyright works than one may have hoped initially.

Fair dealing together with its relative in US copyright law, fair use, trigger much interest and debate in the legal literature, including in Canada in the aftermath of the *CCH* judgment.⁹⁰ The uncertainty of the contours of fair dealing and fair use or subsistence in light of TPMs and other technological developments is also widely commented upon.⁹¹ The *UKCDPA*⁹² contains fair dealing provisions for the allowable purposes of research, private study, criticism, review, and

⁹⁰ *CCH*, *supra* note 5 at para 48. The recent judgments by the Supreme Court are also likely to continue to animate the debate on fair dealing: *Bell Canada*, *supra* note 42 and *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37. In Canada, this includes: Daniel Gervais, "Canadian Copyright Law Post-CCH" (2004) 18 I.P.J. 131; Carys Craig, "The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform", in *In the Public Interest: The Future of Canadian Copyright Law*, Michael Geist, ed. (Toronto: Irwin Law, 2005); Abraham Drassinower, "Taking User Rights Seriously", in M. Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 462; Mira J. Tawfik, "International Copyright Law and Fair Dealing as a User Right" (2005) UNESCO Copyright Bulletin, online: [supra note 6 at 209-221; Carys Craig, *Copyright, Communication and Culture, Towards a Relational Theory of Copyright Law* \(Cheltenham, UK: Edward Elgar, 2011\) \[*Copyright, Communication and Culture*\] at 155-202.](http://portal.unesco.org/culture/en/ev.php-;Giuseppina D'Agostino,)

⁹¹ *Ibid.* In the US this includes: Wendy J. Gordon "Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and Its Predecessors," (1982) 82 Columbia Law Review 1600; Tom W. Bell, "Fair use vs. Fared use: the Impact of Automated Rights Management on Copyright's Fair Use Doctrine" (1998) 76 N.C. L. Rev. 557; Ruth Okediji, "Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace", (2001) 53 Fla. L. Rev. 107; Glynn S. Lunney, Jr., "Fair Use and Market Failure: Sony Revisited" (2002) 82 B.U. L. Rev. 975; Wendy J. Gordon, "Market Failure and Intellectual Property: A Response to Professor Lunney" (2002) 82 B.U.L. Rev. 1031 1043; Raymond Shih Ray Ku, "Consumers and Creative Destruction: Fair Use Beyond Market Failure" (2003) 18 BTLJ. 539; Wendy J. Gordon & Daniel Bahls, "The Public's Right to Fair Use: Amending Section 107 to avoid the 'Fared Use' Fallacy" (2007) Utah L. Rev. 619; Joseph P. Liu, "Two-Factor Fair Use? (2008) 31 Colum. J.L. & Arts 571; Edward Lee, "Technological Fair Use" (2010) 83 S. Cal. L. Rev. 797.

⁹² *Supra* note 27.

news reporting,⁹³ some of which are more restrictive in interpretation than in Canada.⁹⁴ In France, the CPI enumerates acts that do not infringe copyright under specific conditions and so long as they do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.⁹⁵

In the US, section 107 of the *Copyright Act of 1976* codified the doctrine of fair use.⁹⁶ In contrast with fair dealing in Canada and in the UK, and the exceptions to copyright infringement in France, the fair use list of allowable purposes is not exhaustive.⁹⁷ A broad range of uses have been held to constitute fair use, from home video recording of broadcasts for later viewings⁹⁸ to parody,⁹⁹ and fair use gives rise to litigation with respect to very diverse acts, including the use of designer eyewear protected by copyright in a retailer's advertisement without the designer's consent.¹⁰⁰

In *CCH*, the Supreme Court had to determine whether the custom photocopy service offered by the Great Library to its patrons upon request (including lawyers, law students, and members of the judiciary) of photocopies of extracts from legal texts fell under the fair dealing exception in section 29 of the *CCA* "for the purpose of research or private study."¹⁰¹ In a unanimous judgment, Chief Justice McLachlin called for a broad interpretation of fair dealing: "In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be

⁹³ *Ibid*, ss 29-30.

⁹⁴ *Ibid*, s 29(1), which limits the purpose of research to non-commercial research. In Canada, research can be for commercial or non-commercial purposes: *CCH*, *supra* note 5 at para 51. For a comparative analysis between fair dealing in Canada and the UK and fair use in the US, see D'Agostino, "Healing Fair Dealing," *supra* note 90.

⁹⁵ Art L122-5 3°-9° CPI. The purposes include: criticism, news reporting, parody, and caricature.

⁹⁶ *An Act for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes*, Pub. L. 94-553 (19 October 1976).

⁹⁷ 17 USC § 107 lists the following non-exhaustive purposes: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." It lists the factors that shall be considered to assess fair use, although they are not exhaustive. The factors that shall be considered include "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

⁹⁸ *Sony Corp. v Universal City Studios, Inc.*, 464 U.S. 417, 454-55 (1984) (US Supreme Court).

⁹⁹ *Campbell v Acuff-Rose Music Inc.*, 510 U.S. 569 (1994) (US Supreme Court).

¹⁰⁰ *On Davis v The Gap, Inc* 246 F.3d 152 (2d Cir. 2001). In that case, the use of eyewear protected by copyright in an advertisement by retailer The Gap was held not to be fair use.

¹⁰¹ *CCH*, *supra* note 5 at para 47.

interpreted restrictively.”¹⁰² In doing so, the Supreme Court, in line with the Court of Appeal, departed from earlier prevailing narrow interpretations of fair dealing that reflected a more author-centric application of copyright.¹⁰³ To show that a dealing is fair under section 29 of the *CCA*, a defendant must prove that the dealing was made for one of the purposes¹⁰⁴ and that the dealing was fair.¹⁰⁵ In the case of criticism, review, and news reporting, there is an additional requirement to reference the source of the copyright work.¹⁰⁶ On the first requirement, i.e., that the dealing of the Law Society (through the Great Library) fell under the purpose of research or private study, the Court stated that “‘Research’ must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.”¹⁰⁷ The Supreme Court added that “research” can apply in a commercial context, namely lawyers performing legal research on behalf of their clients for commercial gain.¹⁰⁸ On the second requirement, the Supreme Court enumerated a non-exhaustive list of six factors that should guide courts and adjudicators on the factual assessment of whether the dealing with a copyright work was fair.¹⁰⁹ The six factors are: (1) the purpose of the dealing, i.e., making “an objective assessment of the user/defendant’s real purpose or motive in using the copyrighted work;”¹¹⁰ (2) the character of the dealing, i.e., how the work is dealt with (e.g., widespread distribution v. limited copies for private use;¹¹¹ (3) the amount of the dealing, i.e., both the amount of the work taken and the importance of the work;¹¹²

¹⁰² *CCH*, *supra* note 5 at paras 48, 51, where the Court held (para 51), that a fair dealing for the purpose of “research,” under section 29 of the *CCA*, *supra*, note 1 “must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.”

¹⁰³ Craig, “Copyright, Communication and Culture,” *supra* note 90 at 162, 166-168 & 179, where the author summarizes the effects of *CCH* on fair dealing in Canada as follows: “The Supreme Court in *CCH* established a vision of fair dealing that differed from anything previously seen in the Canadian Courts. As the case progressed from Trial Division to the highest court in the land, fair dealing was transformed from a limited exception to an integral part of the copyright system; from a controversial privilege to a recognized right; from anomaly in an owner-oriented system to an instantiation of the public-owner balance.” See also Giuseppina D’Agostino, (2007) “Fair Dealing after *CCH*” online: <http://www.pch.gc.ca/pc-ch/org/sectr/ac-ca/pda-cpb/publctn/cch-2007/index-eng.cfm>, at 13-17 where the author describes the approach adopted in *CCH* as being “user-centric.”

¹⁰⁴ The purposes enumerated in the *CCA*, *supra* note 1, s 29 are: research, private study, education, parody, or satire.

¹⁰⁵ *CCH*, *supra* note 5 at para 50.

¹⁰⁶ *CCA*, *supra* note 1, ss 29.1-29.2.

¹⁰⁷ *CCH*, *supra* note 5 at para 51.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, at para 53ff. The six factors were the ones proposed by the Federal Court of Appeal, Linden J.A.: *CCH Canadian Ltd. v Law Society of Upper Canada*, 2002 FCA 187.

¹¹⁰ *CCH*, *supra* note 5 at para 54.

¹¹¹ *Ibid.*, at para 55. The Court indicated that the custom of a particular trade can be helpful in assessing the fairness of the dealing.

¹¹² *Ibid.*, at para 56.

(4) alternatives to the dealing, e.g., the existence of a non-copyright work and whether the dealing was reasonably necessary to achieve the ultimate purpose;¹¹³ (5) the nature of the work, e.g., whether the work was published or not or whether it was confidential;¹¹⁴ and (6) the effect of the dealing on the work, i.e., “if the reproduced work is likely to compete with the market of the original work,” an important but not the most important factor to consider.¹¹⁵

Applying the two-step analysis of fair dealing to the practice by the Law Society, the Supreme Court held that its custom photocopying service was provided for the purpose of research, review, and private study.¹¹⁶ The Court also held that the Law Society’s dealings with the copyright works were fair, relying in part on the Access Policy of the Great Library and the safeguards that were in place to ensure that the dealings with the copyright works were fair.¹¹⁷

The Supreme Court had to interpret fair dealing on two other recent occasions, when it referred to *CCH* and brought further clarifications to the scope of fair dealing. In *Bell Canada*, the Supreme Court had to determine whether the practice by some commercial Internet sites to let consumers preview music before making a purchase was fair dealing.¹¹⁸ The issue arose with respect to SOCAN’s proposed tariffs for the determination of royalties to be paid by users when musical works are communicated to the public over the Internet.¹¹⁹ In a unanimous judgment delivered by Abella J., the Court held that the practice of music preview was fair dealing.¹²⁰ With respect to the first of the two steps of the factual analysis of fair dealing, the Court applied a liberal

¹¹³ *Ibid*, at para 57.

¹¹⁴ *Ibid*, at para 58

¹¹⁵ *Ibid*, at para 59.

¹¹⁶ *Ibid*, at para 64, where the Court held: “The reproduction of legal works is for the purpose of research in that it is an essential element of the legal research process. There is no other purpose for the copying; the Law Society does not profit from this service. Put simply, its custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law.”

¹¹⁷ *Ibid*, at paras 61ff. In particular the Court assessed the effects of the Access Policy as follows: “The Access Policy places appropriate limits on the type of copying that the Law Society will do. It states that not all requests will be honoured. If a request does not appear to be for the purpose of research, criticism, review or private study, the copy will not be made. If a question arises as to whether the stated purpose is legitimate, the Reference Librarian will review the matter. The Access Policy limits the amount of work that will be copied, and the Reference Librarian reviews requests that exceed what might typically be considered reasonable and has the right to refuse to fulfill a request.”: *ibid*, at para 78.

¹¹⁸ *Bell Canada*, *supra* note 42.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid*, at para 49.

interpretation to the purpose of research, consistent with the approach taken in *CCH*.¹²¹ Such activity need not have a creative component, as per the ordinary meaning of research. One of the objectives of the *CCA* being to encourage the dissemination of works does not necessarily entail a creativity component.¹²² Abella J. confirmed that the purpose had to be assessed from the perspective of the user and that this was consistent with the qualification of exceptions to copyright infringement as users' rights.¹²³

Turning to the second step of the factual analysis of fair dealing, Abella J. applied the six factors enumerated in *CCH* that can help determine the fairness of the dealing.¹²⁴ The Court confirmed the reasoning of the Copyright Board in applying each of the six factors.¹²⁵ Consistent with the first step of the fair dealing analysis (i.e., whether it falls under one of the enumerated purposes), the Court applied the third factor, i.e., the amount or quantity of the dealing from the perspective of each individual user, not from the perspective of the online music service provider in the aggregate.¹²⁶ In applying the sixth factor, i.e., the effect of the dealing on the copyright work and whether the dealing adversely affects or competes with the copyright work, the Court considered the poor quality of the preview and the fact that the preview increased sales and dissemination of musical recordings and concluded that previews do not negatively interfere with the work.¹²⁷ As a result, online music providers who offer music previews to their customers do not infringe copyright.¹²⁸

In *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* [*Alberta*],¹²⁹ the Supreme Court reviewed the Copyright Board's assessment of whether certain practices performed by educational institutions constituted fair dealing and were therefore outside the scope

¹²¹ *Supra* note 5, *ibid*, at paras 15-30.

¹²² *Bell Canada*, *supra* note 42 at paras 21-22.

¹²³ *Ibid*, at paras 29-30.

¹²⁴ The six factors enunciated in *CCH*, *supra* note 5, and applied in *Bell Canada*, *supra* note 42 at paras 31-43 are: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.

¹²⁵ *Bell Canada*, *supra* note 42 at paras 31-43.

¹²⁶ *Ibid*, at paras 39-43.

¹²⁷ *Ibid*, at para 48.

¹²⁸ *Ibid*, at para 49.

¹²⁹ *Supra* note 90.

of the tariff proposed by Access Copyright¹³⁰ for the reproduction of its repertoire for use in elementary and secondary schools in Canada.¹³¹ In particular, the Court had to review the practice by which teachers made photocopies of short excerpts of copyright works on their own initiative and instructed students to read them as a complement to the main relevant textbook(s). The Copyright Board had found that although such practice fell in the category of research or private study, it was not fair.¹³² On judicial review, the Federal Court of Appeal held that the Copyright Board's assessment of fair dealing was reasonable.¹³³ In a five to four judgment, the Supreme Court allowed the appeal by the Coalition (i.e., Ministers of Education and school boards across Canada) and remitted the matter to the Copyright Board for reconsideration based on the reasons it provided on the interpretation of fair dealing,¹³⁴ more particularly, the interpretation of four of the six factors to consider in the second step of the fair dealing analysis.¹³⁵

While the first step of the fair dealing analysis, i.e., the fact that the photocopying by the teachers fell under the purpose of research or private study was not in dispute, the Copyright Board had found that the purpose of the dealing was not fair because the photocopying of excerpts was not made at the students' request but by teachers and that the photocopied excerpts were reviewed by the students in the classroom.¹³⁶ Abella J., for the majority, reiterated the interpretation given in *Bell Canada* that as a user's right, the purpose of the dealing needed to be assessed from the perspective of the user.¹³⁷ The purpose of the copier was relevant at the fairness stage of the analysis only to the extent that there was a purpose separate from the allowable purpose of the user, e.g., research or private study, which was not the situation in the case of teachers and their

¹³⁰ Access Copyright administers the reproduction of published literary and artistic works on behalf of authors and publishers by negotiating licences with institutional users or by applying to the Copyright Board to certify a royalty through a tariff. See *Alberta*, *supra* note 90 at para 2.

¹³¹ The province of Quebec excluded.

¹³² *Collective Administration in relation to rights under sections 3, 15, 18 and 21, Re*, [2009] C.B.D. No. 6.

¹³³ *Alberta (Minister of Education) v Canadian Copyright Licensing Agency*, 2010 FCA 198, [2011] 3 F.C.R. 223.

¹³⁴ *Alberta*, *supra* note 90 at para 38.

¹³⁵ The first step of the fair dealing analysis, i.e., whether the photocopies were for the allowable purpose of research or private study was not in dispute. The factors that the Supreme Court reviewed were: the purpose of the dealing, the amount of the dealing, alternatives to the dealing, and the effects of the dealing on the work: *Alberta*, *supra* note 90 at paras 14-37. In accordance with *Alberta*, *ibid*, The Copyright Board rendered its decision in January 2013: *Reprographic Reproduction 2005-2009, Re*, 2013 CarswellNat 58 (Copyright Board).

¹³⁶ *Alberta*, *supra* note 90 at paras 15, 26.

¹³⁷ *Ibid*, at para 22.

students.¹³⁸ Abella J. interpreted the meaning of “private” in the allowable purpose of private study as not being confined to “splendid isolation” and including study performed in a classroom setting: “Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude.”¹³⁹

In the interpretation of the sixth factor to assess whether the dealing was fair, i.e., the effect of the dealing on the copyright work, Abella J. found the evidence submitted by Access Copyright that textbook sales had decreased by over 30 per cent in the last 20 years to be inconclusive because there was no evidence that this decline was linked to the photocopying by the teachers.¹⁴⁰ Abella J. found it difficult to believe that the teachers’ practice of photocopying small excerpts would compete with copyright holders. Were they not allowed to photocopy them, the alternative would more likely be not to use the excerpts or have the students refer to the one book available for reference.¹⁴¹ On the basis of these reasons, the matter of certifying Access Copyright’s tariff was remitted to the Copyright Board for reconsideration.¹⁴²

In light of the judgments of the Supreme Court in *CCH*, *Bell Canada*, and *Alberta*, to what extent is fair dealing helpful and relevant for consumers who lawfully access copies of copyright works to determine the permitted scope of their use? The answer is somewhat paradoxical. On the one hand, as noted by the Supreme Court in *CCH*, the fair dealing exception is an integral part of the *CCA* and has been the springboard to elevate exceptions to copyright infringement to users’ rights.¹⁴³ On the other hand, the nature of the fair dealing provisions in the *CCA* and the factual

¹³⁸ *Ibid*, at paras 22-23. Abella J. responded to the respondents’ arguments that were based on various cases including *University of London Press, Ltd. v University Tutorial Press, Ltd.*, [1916] 2 Ch. 601 and *Copyright Licensing Ltd. v University of Auckland*, [2002] 3 N.Z.L.R. 76 (HC) where the copier had a purpose separate of the one of the users (e.g., commercial v. educational)

¹³⁹ *Alberta*, *supra* note 90 at para 27.

¹⁴⁰ *Ibid* at para 33. In doing so, Abella J. for the majority, applied a similar reasoning to the one in *CCH*, *supra* note 5 (*ibid*, at para 35).

¹⁴¹ *Ibid*, at para 36.

¹⁴² *Ibid*, at para 38. The Copyright Board rendered its decision in January 2013: *Reprographic Reproduction 2005-2009, Re*, 2013 CarswellNat 58 (Copyright Board).

¹⁴³ *CCH*, *supra* note 5 at para 48. In addition to *Bell Canada*, *supra* note 42 and *Alberta*, *supra* note 90, the Supreme Court reiterated that exceptions to copyright infringement are user rights in *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, *supra* note 42 at paras 56ff, where the Court held that the market-based value for signal regulatory regime introduced by the CRTC was *ultra vires* of its powers. The regime would allow private local television stations to negotiate direct compensation for the retransmission of their signals by broadcasting distribution undertakings. As such, the Court held that the regime would override the balance set in the *CCA*, *supra* note 1, between users’ rights (in this case *CCA*, *ibid*, ss 31 (1) (2)) and copyright holders’ rights.

analysis required to assess whether a dealing is fair, under the guidance of the Supreme Court in *CCH*, *Bell Canada*, and *Alberta*, is an unlikely vehicle to help consumers assert their rights to copies of copyright works. At the same time, the analysis required to assess the fairness of a dealing may provide useful guidance for the interpretation of other exceptions to copyright infringement to the extent that it embeds the objectives of the *CCA* and the need to balance the interests of copyright holders, authors, users, and the public.¹⁴⁴

With respect to the first step to assess fair dealing, i.e., whether it falls under one of the allowable purposes, while the Supreme Court called for a large and liberal interpretation, the list of the allowable purposes is finite, unlike fair use in the US.¹⁴⁵ The broad interpretation of research in *Bell Canada* as not being limited to creative acts or “the establishment of new facts or conclusions” with the potential of being “piecemeal, informal, exploratory, or confirmatory” or conducted for no other purpose except for personal interest, is significant for copyright consumers for its recognition of the merit and value of seemingly more passive uses of copyright works.¹⁴⁶ The holding in *Bell Canada* that making available music previews to consumers is fair dealing is a positive step for consumers in a broader sense.¹⁴⁷ The interpretation in *Alberta* that private study need not take place in solo but can occur as part of a group also broadens the scope of possible uses by copyright consumers that constitute a fair dealing.¹⁴⁸ The recent addition of parody or satire as allowable purposes for fair dealing is beneficial to consumers in bringing further clarity, in a YouTube and the like era with the creativity, communication, and sharing culture that it epitomizes.¹⁴⁹ These wide and liberal interpretations of the allowable purposes of fair dealing are significant to copyright consumers and their ramifications have yet to be fully appreciated. Outside consumers’ transformative uses of existing copyright works that could fall under parody or satire, or even criticism or review, it remains uncertain that fair dealing (in particular the other

¹⁴⁴ See: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, *supra* note 42. This includes the interpretation of the four new user provisions recently introduced *CCA*, *supra* note 1, which I discuss in Part II D of this chapter.

¹⁴⁵ 17 USC § 107.

¹⁴⁶ *Bell Canada*, *supra* note 42 at para 22.

¹⁴⁷ *Ibid.*, at para 49.

¹⁴⁸ *Alberta*, *supra* note 90 at para 27.

¹⁴⁹ *CCA*, *supra* note 1, s 29 “education, parody or satire” are now part of the allowable purposes of fair dealing. It can be argued that a broad interpretation of the purpose of “criticism” further to the large and liberal interpretation of fair dealing by the Supreme Court in *CCH*, *supra* note 5, already included parody or satire. See Carys Craig, “Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32” in *From Radical Extremism to Balanced Copyright: Canadian Copyright and the Digital Agenda*, Michael Geist, ed, (Irwin Law: Toronto, 2010) 177 at 188-189.

allowable purposes of research or private study) would cover a large portion of consumers' non-transformative entertainment, instructional, or enjoyment uses of copies of copyright works. As I discussed in Chapter 2 and will further argue in Chapter 6, these less active consumer uses are a no less important and an integral part of the copyright framework's objectives than creative output uses.¹⁵⁰

With respect to the second step to assess fair dealing, the six factors that the Supreme Court relied on as an analytical framework are non-exhaustive and their relevancy may vary on a case-by-case basis to assess fairness.¹⁵¹ As the Court pointed out in *CCH*, the six factors are interrelated: the assessment of one factor, e.g., the purpose of the dealing influences the assessment of the other(s), e.g., the amount of the dealing.¹⁵² This approach allows flexibility, but leads to legal uncertainty, which is less than ideal and workable for consumers who seek to understand and assert their rights to copies of copyright works. As a factual analysis on a case-by-case basis, its application requires a level of sophistication and understanding of copyright law that poses challenges even to experienced lawyers.

It is not clear how the non-exhaustive list of six factors enumerated by the Supreme Court in *CCH* to determine the fairness of a dealing will play out with respect to consumers' uses of copyright works for personal purposes. The onus to establish that the dealing is fair rests with consumers. The purpose of the dealing, which is here non-commercial and as such more favourable to a finding of fairness, will counterbalance the amount of the dealing which will generally comprise the entirety of the work, a less favourable factual element.¹⁵³ The application by the Supreme Court of the sixth factor, i.e., the effect of the dealing on the work and its potential competition with the economic (and moral) rights of copyright holders offers promise for the ascertainment of consumers' rights to copies of copyright works. First, the Supreme Court's indication in *CCH* that it is not the most important factor in the analysis signals a departure from a copyright-holder-centric application of copyright law.¹⁵⁴ Second, and in the same vein, the relatively high threshold

¹⁵⁰ See the discussion in Chapter 2 Part V. See also the discussion on the theoretical justifications of copy ownership in Chapter 6 Part III.

¹⁵¹ *CCH*, *supra* note 5 at para 60.

¹⁵² *Ibid* at para 56.

¹⁵³ *Ibid*.

¹⁵⁴ As noted by the Supreme Court in *Bell Canada*, *supra* note 42 at para 9, this departure was initiated in *Théberge*, *supra* note 16, in contrast to earlier judgments (citing *Bishop v Stevens*, [1990] 2 S.C.R. 467, at pp. 478-79).

on the evidence needed to establish a link between the dealing and the detrimental effects to copyright holders is significant. It rejects the common assumption that the performance of reserved acts without compensation inevitably leads to a weakening of copyright holders' economic rights. In the absence of a judicial pronouncement on the issue of fair dealing encompassing a large portion of consumers' uses of commercial copies of copyright works for personal purposes, the appeal of fair dealing to assert copyright consumers' rights to copies of copyright works remains uncertain.

While *CCH*, *Bell Canada*, and *Alberta* open up a new realm of possibilities¹⁵⁵ for what could constitute fair dealing that may supplement the limited scope of permitted uses of digital copyright works without the authorization of the copyright holder, fair dealing remains limited to specific purposes.¹⁵⁶ By design, fair dealing and the two-step factual analysis proposed in *CCH* cannot do much in the way of alleviating the ambiguity that subsists for consumers of what constitutes lawful v. infringing uses. A US fair use model, which does not restrict the allowable purposes for its application, may be more desirable for its coverage of broader uses relevant to consumers than the Canadian fair dealing model, as was illustrated in the past in the landmark *Sony Corp. v. Universal City Studios, Inc.* judgment.¹⁵⁷ At the same time, the open-ended purposes and factors for the application of fair use require a case-by-case analysis that remains heavily dependent on judicial interpretation. The ability of the fair use doctrine to adequately address consumers' rights to use commercial copies of copyright works for personal purposes remains questionable.¹⁵⁸ The interaction of fair dealing and fair use with other provisions,

¹⁵⁵ In the US, a significant body of literature looks at the flexibility that the equivalent fair use provision can provide in favour of users and in the context of developing technologies. See for example: Okediji, *supra* note 91; Lunney, *supra* note 91; Joseph P. Liu, "Enabling Copyright Consumers" (2007) 22 BTLJ 1099 [Liu, "Enabling Copyright Consumers"].

¹⁵⁶ On the limits that this imposes on fair dealing, in spite of the developments brought by *CCH*, *supra* note 5, see Craig, "Copyright, Communication and Culture," *supra* note 90 at 170-174, in particular at 172.

¹⁵⁷ *Sony Corp. v. Universal City Studios, Inc.*, *supra* note 98, where the US Supreme Court recognized that home video recording of broadcasts for later viewings fell under the fair use exception to copyright infringement.

¹⁵⁸ Let alone the prohibitive costs that consumers would need to incur to assert their claims. See Jessica Litman, "Lawful Personal Use" (2007) 85 Tex. L. Rev. 1871 [Litman, "Lawful Personal Use"] at 1898-1903 where the author describes how it is not always clear that personal uses would constitute fair use and how fair use as a judge-made doctrine applying a case-by-case analysis is ill adapted to individual users; in a broader context, see also Craig, "Copyright, Communication and Culture," *supra* note 90 at 174-192, in particular at 180-181. The author recommends that Canada move from a fair dealing approach to a fair use approach, with caution and reservations on the effectiveness of fair use at balancing copyright holders' rights with the public interest. She notes: "the introduction of such a defence should not, therefore, be

including TPMs, is another factor to consider when assessing the efficacy of these exceptions to copyright infringement to adequately address copyright consumers' rights and interests.¹⁵⁹ The next step is to explore whether the four recently introduced user provisions in the *CCA* are more likely to achieve that goal.

D. The four new user provisions

Recent amendments to the *CCA* added four new exceptions to copyright infringement that allow individual users¹⁶⁰ to perform certain acts for defined purposes without copyright holders' authorization.¹⁶¹ Prior to reviewing each exception, the following introductory remarks will highlight their commonality while providing some context.

The four new user provisions allow acts to be performed on substantial parts of copyright works.¹⁶² They co-exist with the fair dealing provisions and may be invoked with these provisions, to the extent that they are applicable.¹⁶³ The scope of the four new user provisions permits acts that fall within and beyond the allowable purposes of fair dealing.¹⁶⁴ Each of the permitted acts thereunder would likely fulfill the requirement of fairness under the second step of the fair dealing analysis, although it does not need to be established. The acts need to fall within specific purposes and uses and fulfill other conditions.¹⁶⁵ The user provision that pertains to reproduction for private purposes¹⁶⁶ is subject to the application of the private copying regime.¹⁶⁷

viewed as a panacea; what is really needed is a continuation and development of the kind of attitudinal shift that is discernable in recent Canadian Supreme Court jurisprudence. ... The US experience reveals the weight of this warning, first through the limits that have been placed on fair use by US courts to constrain its application, and second, through the effective evisceration of fair use in the face of technical control, supported by the Digital Millennium Copyright Act 1998."

¹⁵⁹ See the discussion in Part III B of this chapter.

¹⁶⁰ Three of the four new user provisions apply to "individuals": *CCA*, *supra* note 1, ss 29.21- 29.23, while one applies to persons, which includes natural and physical persons: *ibid*, s 29.24.

¹⁶¹ *CCA*, *supra* note 1, ss 29.21-29.24.

¹⁶² I.e., users who perform acts on non-substantial parts do not infringe copyright and do not need to invoke an exception to copyright infringement: see the discussion in Part II A of this chapter.

¹⁶³ *CCH*, *supra* note 5 at para 49.

¹⁶⁴ For example the acts authorized under the non-commercial user-generated content: *CCA*, *supra* note 1, s 29.21, may or may not fall under the purpose of parody or satire under the fair dealing provisions (*ibid*, s 29). The reproduction for private purposes (*ibid*, s 29.22) or the later viewing or listening exception (*ibid*, s 29.23) may or may not fall under the purpose of research or private study in the fair dealing provision (*ibid*, s 29).

¹⁶⁵ *CCA*, *supra* note 1, ss 29.21-29.24.

¹⁶⁶ *CCA*, *supra* note 1, s. 29.22.

The four new user provisions do not require remunerating copyright holders, similar to acts performed on a non-substantial part or acts that are fair dealing, and unlike the private copying regime.¹⁶⁸

Most consumers would be surprised to find out that prior to the entry into force of the amendments to the *CCA* in 2012 and the addition of the new user provisions, they were either not allowed to or it was unclear whether they could upload their own performance of the latest hit on YouTube, could copy their favourite musical recordings on their iPods, or record broadcasts for later viewing.¹⁶⁹ These mundane acts have formed part of the everyday life of most copyright consumers for some time now. With multiple technological tools that enhance the overall experience and convenience of the use of copyright works, lawful consumers can reasonably expect that they are allowed to apply these capabilities through the acts they perform on copies of copyright works.

By adding the four new user provisions, Parliament took steps toward a formal recognition of the place and interests of individual copyright users more than it had ever done before.¹⁷⁰ Up until then, the *CCA*'s sparse references to users were mainly to institutional users.¹⁷¹ The extent to which the four new user provisions can aptly be called users' rights is another matter, and so is the extent to which they fulfill copyright consumers' needs and expectations within the objectives of copyright law. I explore these questions below in this chapter¹⁷² and throughout my thesis.¹⁷³

¹⁶⁷ *Ibid*, at para (3).

¹⁶⁸ *CCA*, *supra* note 1, ss 3, 29-29.2, 79-87.

¹⁶⁹ *CCMA*, *supra* note 75, amended the *CCA*, *supra* note 1, by introducing ss 29.21-29.24.

¹⁷⁰ *CCMA*, *supra* note 75, Preamble, states, with respect to the exclusive rights of copyright holders, that "some limitations on those rights exist to further enhance users' access to copyright works or other subject-matter." For a great part of the lengthy copyright legislative reform that has led to the entry into force of the *CCMA*, *ibid*, more specifically *Bill C-32, An Act to amend the Copyright Act*, 3rd Session, 40th Parl., 2010 (1st reading June 2, 2010) and *Bill C-11 An Act to amend the Copyright Act*, 1st session, 41st Parl, 2011 (which became the *CCMA*, *ibid*) the Government of Canada labeled the initiative "Balanced Copyright." The Government website address where it communicated recent developments on copyright law around the entry into force of the *CCMA*, *ibid*, was labelled: "balancedcopyright.gc.ca."

¹⁷¹ Such as educational institutions, libraries, museums, and archives: *CCA*, *supra* note 1, ss 29.4ff.

¹⁷² See further below in Part II D and in Part III and Part IV of this chapter.

¹⁷³ In particular, in the Second Part (Chapter 4 to Chapter 7) and Fourth Part (Chapter 12) of my thesis.

I have already discussed the reference to “individuals” or to “persons” in the four new user provisions and how this illustrates an unprecedented shift in the *CCA*.¹⁷⁴ The *CCA* singles out more than ever before¹⁷⁵ a group of individuals that are to be likened to consumers as defined in consumer protection laws.¹⁷⁶ I have also discussed how the commercial v. non-commercial dichotomy, a defining factor by which to determine the identity of consumers in consumer protection law, is present to only a limited extent in the four new user provisions and the *CCA*.¹⁷⁷ While this gives rise to confusion about the group of users targeted by the four new user provisions (i.e., that it may extend to users performing acts beyond non-commercial purposes), this is not of primary concern here. As I discussed in Chapter 2, my thesis focuses on consumers as defined by consumer protection laws: i.e., individuals (natural persons) who perform acts for non-commercial purposes.¹⁷⁸ They fall within the scope of each of the four new user provisions.¹⁷⁹ With these general considerations in mind, I will briefly introduce the distinguishing features of each of the four new user provisions.

¹⁷⁴ See the discussion in Chapter 2 Part IV.

¹⁷⁵ Prior to the entry into force of the *CCMA*, *supra* note 75, there was one reference to “consumers” under the private copying regime provisions: *CCA*, *supra* note 1, ss 79ff.

¹⁷⁶ See the discussion in Chapter 2 Part IV. Not all the acts under the four new user provisions involve a consumer transaction (for example, the non-commercial user-generated content exception, *CCA*, *supra* note 1, s 29.21, does not necessarily imply the purchase of the pre-existing copyright work from which the new work is created), but the individuals that fall under their scope would generally also be consumers under consumer protection laws: *ibid*.

¹⁷⁷ *Ibid*.

¹⁷⁸ See in particular Chapter 2 Part IV.

¹⁷⁹ This is under the working premise that reference to private use and private purposes could include uses performed by consumers as defined in consumer protection laws: *ibid*.

(i) Non-commercial user-generated content

The non-commercial user-generated content exception to copyright infringement (familiarily referred to as the “YouTube exception”)¹⁸⁰ allows individuals to perform on any form of published copyright works,¹⁸¹ *for the creation of new copyright works*, all acts (but for one) otherwise reserved to copyright holders (i.e., the exclusive right to produce, reproduce, and to perform substantial parts of the works in public).¹⁸² The individuals have rights with respect to these newly created works that are limited to: authorizing other household members to use the works and authorizing an intermediary to disseminate the newly created works,¹⁸³ for non-commercial purposes, with proper reference to the pre-existing work. Such use or dissemination must not “have a substantial adverse effect, ... on the exploitation ... of the existing [copyright] work or on an existing or potential market for it, including that the new [copyright] work is not a substitute for the existing one.”¹⁸⁴ The individual must also have reasonable grounds to believe that the pre-existing copyright work or copy of it was not infringing copyright.¹⁸⁵

The non-commercial user-generated content exception to copyright infringement is the broadest of the four new user provisions in two respects: the wide range of permitted acts that can be performed with respect to pre-existing copyright works and the fact that it is not specifically subjected to the non-circumvention of any TPMs.¹⁸⁶ It confers a special standing to the creation of new copyright works that takes place through the use of pre-existing works (often referred to as transformative acts or uses).¹⁸⁷ The premise is that if the objective of copyright is to promote the creation of works, the use of a pre-existing work to create a new work should be desirable and

¹⁸⁰ See: Government of Canada, *Balanced Copyright, Copyright Modernization Act – Background*, What will the Bill do – Users and Consumers, available at http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01237.html.

¹⁸¹ Or otherwise made available to the public: *CCA*, *supra* note 1, s 29.21(1).

¹⁸² *CCA*, *supra* note 1, ss 3, 15, 18, 21 26. It does not permit individuals to publish unpublished works: *CCA*, *supra* note 1, s 29.21. Also, for the exception to copyright infringement to apply the new creation must meet the requirement of originality for works to be protected: see *supra* note 5.

¹⁸³ Or authorize members of their household to do so: *ibid*.

¹⁸⁴ *CCA*, *supra* note 1, s 29.21(1)d.

¹⁸⁵ *Ibid*, s 29.21 (1) c.

¹⁸⁶ *CCA*, *supra* note 1, s 29.21.

¹⁸⁷ Under US copyright law, whether a transformation occurred, i.e., the creation of a new work when using a pre-existing copyright work, is a favourable element for a finding a fair use in applying the first factor of the fair use provision i.e., the purpose and character of the use (17 USC § 107): *Campbell v Acuff-Rose Music*, *supra* note 99.

should be promoted to balance the interests of the pre-existing copyright holder with the ones of the would-be copyright holder.¹⁸⁸ Among the broader group of consumers and users, it favours individuals who generate new creations.¹⁸⁹ I have questioned in Chapter 2 the greater emphasis that is placed on creative consumers, the extent to which this differential treatment is justified within copyright's design and objectives, and the potential detrimental effects that this has on less laborious users.¹⁹⁰ The sharp contrast between the non-commercial user-generated content provision and the other new user provisions introduced in the *CCA* that I look at next illustrate that gap.

(ii) Reproduction for private purposes

The reproduction for private purposes exception to copyright infringement (colloquially referred to as the “MP3 exception”)¹⁹¹ allows individuals to perform one of the acts (i.e., reproduction) otherwise reserved to copyright holders on any form of copyright works, subject to a list of strict conditions.¹⁹² This user provision applies to a broad range of methods of reproductions,¹⁹³ subject to the application of the private copying regime that continues to apply to sound recordings and certain copyright works embodied in sound recordings¹⁹⁴ and that fall under its purview.¹⁹⁵

This user provision does not set any limits on the number of reproductions that can be made,¹⁹⁶ but does require that they be made for private purposes.¹⁹⁷ Because the permitted act is limited to

¹⁸⁸ I discuss the theoretical justifications of copyright and copy ownership in Chapter 6 Part III.

¹⁸⁹ I discuss the different categories of users and their current place in copyright law in Chapter 2 and make recommendations on copyright consumers' rights in Chapter 12 Part IV and, in particular, IV C.

¹⁹⁰ See the discussion in Chapter 2 Part V.

¹⁹¹ See: Government of Canada, *Balanced Copyright, Copyright Modernization Act – Background, supra* note 180.

¹⁹² *CCA, supra* note 1, s 29.22.

¹⁹³ *Ibid*, at s 29.22 (2) which defines medium or device as including “digital memory in which a work or subject-matter may be stored for the purpose of allowing the telecommunication of the work or other subject matter through the Internet or other digital network.”

¹⁹⁴ More precisely: a musical work embodied in a sound recording, a performer performance of a musical work embodied in sound recording, or a sound recording in which a musical work, or a performer's performance of a musical work is embodied *CCA, supra* note 1, s 80(1).

¹⁹⁵ I.e., if the reproduction is made onto an audio recording medium as defined in *CCA, supra* note 1, s 79: *CCA, supra* note 1, s 29.22 (3). I discuss the scope of the private copying regime exception to copyright infringement in Part II B of this chapter.

¹⁹⁶ *Ibid*, s 29.22(4) reference to the destruction of any reproductions made from the copy confirms that multiple reproductions are permitted.

¹⁹⁷ *Ibid*, s 29.22 (1) (e).

reproduction, this exception to copyright infringement would not permit the user to e.g., communicate copies of the work to the public by telecommunication through the internet.¹⁹⁸ The private purpose required for the exception to apply could also be an obstacle although the scope of use that it allows has yet to be defined. The reproduction(s) need(s) to be made from a non-infringing copy that the individual lawfully acquired (other than through loan or rental) on a medium or device that the individual is authorized to use.¹⁹⁹ Other conditions apply to the handling of the reproduction(s) and the copy from which the reproduction was made.²⁰⁰ Last but not least, this user provision is subject to the individual not circumventing any access control or copy control TPM in place.²⁰¹

By its dual requirement of ownership of the copy from which reproductions are made and that reproductions are confined to *private purposes*, the reproduction for private purposes exception applies more specifically to copyright consumers than any of the other user provisions, although its application could extend beyond that group.²⁰² It also supplements the private copying regime that only applies to sound recordings and certain copyright works embedded in sound recordings, and does not cover reproduction on devices such as MP3 players.²⁰³ The fact that it is explicitly subject to TPMs may significantly reduce its scope of application in practice and raises questions about the exact nature of that exception.²⁰⁴

(iii) Later listening or viewing exception

This user provision allows individuals to fix a communication signal or to reproduce a work or sound recording or fix or reproduce a performer's performance that is being broadcast, and to

¹⁹⁸ CCA, *supra* note 1 s 2.4 (1.1).

¹⁹⁹ CCA, *supra* note 1, s 29.22.

²⁰⁰ The individual cannot give the reproduction away: *ibid*, s 29.22 (1) (d). If the individual sells, rents, or gives away the copy from which the reproduction was made, she needs to destroy any reproduction made from that copy: *ibid*, s 29.22 (4).

²⁰¹ CCA, *supra* note 1, s 29.22 (1) (c). CCA, *ibid*, s 41 defines "circumvent" as performing acts either with respect to access controls or controls that restrict the doing of any reserved acts.

²⁰² By contrast, lawful acquisition of the copy is not required for the non-commercial user-generated exception and the purpose is broadened to include non-commercial purposes. The later listening or viewing exception would also typically apply to consumers in their use of a service (i.e., broadcasting), but could apply to a broader circle as well, beyond consumers as understood in consumer law, depending on the interpretation to be given to "private purposes."

²⁰³ See the discussion on the private copying regime in Part II B of this chapter.

²⁰⁴ See the discussion in Part III and Part IV of this chapter.

record a program for later listening or viewing.²⁰⁵ This exception is subject to a list of strict conditions similar to the ones found in the reproduction for private purposes exception examined earlier.²⁰⁶ This exception to copyright infringement applies only if the individual received the program legally²⁰⁷ and does not include work, performer's performance, or sound recordings received through an on-demand service.²⁰⁸ The individual can only make one recording, cannot give the recording away, and cannot keep it longer than is reasonably necessary to view it at a convenient time.²⁰⁹ The individual can only use the recording for her private purposes.²¹⁰ Last but not least, this user provision is subject to the individual not circumventing any access control or copy control TPM in place.²¹¹

The acts authorized in this user provision have been allowed for some time in the US further to the landmark Supreme Court judgment *Sony Corp. v. Universal City Studios, Inc.*,²¹² where the Court held that manufacturers' sale of home video equipment was not contributory infringement of the copyrights in television programs.²¹³ The US Supreme Court arrived at that conclusion, *inter alia*, on the basis that recording a televised copyrighted audiovisual work for time-shifting purposes and for private home use was a fair use²¹⁴ of the work and did not infringe copyright.²¹⁵ In Canada, recording programs for later viewing did not always fall under the allowable purposes of fair dealing,²¹⁶ which explains in part the introduction of this new user provision.

The later listening or viewing exception to copyright infringement legitimizes mundane acts on programs that have been mainstream in many households for decades. It fills a lacuna in the CCA where Canada was lagging behind compared to other jurisdictions. Unlike the reproduction for private purposes exception, it does not deal with copyright consumers and their permitted uses of

²⁰⁵ CCA, *supra* note 1, s. 29.23.

²⁰⁶ See Part II D (ii) of this chapter.

²⁰⁷ CCA, *supra* note 1, s. 29.23 (1)(a).

²⁰⁸ CCA, *supra* note 1, s. 29.23 (3) defines "on-demand service" as "a service that allows a person to receive works, performer's performances and sound recordings at times of their choosing."

²⁰⁹ *Ibid*, s. 29.23 (1) (c),(d),(e).

²¹⁰ CCA, *supra* note 1, s. 29.23(1) (f).

²¹¹ CCA, *supra* note 1, s. 29.23(1) (b). CCA, *ibid*, s. 41, defines "circumvent" as performing acts either with respect to access controls or controls that restrict the doing of any reserved acts.

²¹² *Supra* note 98 at 454-55.

²¹³ *Ibid*.

²¹⁴ In US copyright law, fair use is one of the exceptions to copyright infringement: 17 USC § 107.

²¹⁵ *Sony Corp. v Universal City Studios, Inc*, *supra* note 98 at 455.

²¹⁶ I discuss the fair dealing exception to copyright infringement in Part II C of this chapter.

copies of copyright works lawfully acquired. It covers a broad range of users who have, at one point in time, the ability to record programs protected by copyrights and do so for private purposes. The fact that it is subject to TPMs raises questions around its exact scope and nature.²¹⁷

(iv) Backup copies

The fourth user provision allows persons (which would include natural and moral persons) to make one of the acts otherwise reserved to copyright holders (i.e., reproduction) with any form of copyright work for backup purposes, so long as the following conditions are respected: the person owns or has a licence to use a copy of the copyright work that is being reproduced; it is not an infringing copy; the person does not give any of the reproductions away.²¹⁸ The application of the backup copy exception to copyright infringement is also subject to not circumventing any existing access control or copy control TPMs.²¹⁹ With its recent introduction to the *CCA*, the backup copies provision extends to all copyright works a similar exception to copyright infringement that already applied to computer programs.²²⁰

The four new user provisions recognize the interests of copyright users in an unprecedented way and validate acts that were previously an infringement of copyright, or the status of which was unclear. A more sobering account of these amendments is that they have been keeping us waiting. The acts that are now permitted are so much part of the everyday life of an increasingly large segment of consumers, with no apparent harm to copyright holders, that Parliament had little choice but to recognize their lawfulness to maintain the credibility of copyright. Does the predominantly narrow scope and piecemeal approach of the four new user provisions address lawful consumers' reasonable expectations and does it reflect the main objectives of copyright? Or, does it instead reflect a copyright-holder-centric approach that is mainly preoccupied with preserving the strength of the copyright holders' exclusive rights with little compromise? The co-existence of some of the four new user provisions with TPMs and the uncertainty of their

²¹⁷ See the discussion in Part III and Part IV of this chapter.

²¹⁸ *CCA*, *supra* note 1, s 29.24.

²¹⁹ *CCA*, *supra* note 1, s 29.24 (1) (c). *CCA*, *ibid* s 41 defines "circumvent" as performing acts either with respect to access controls or controls that restrict the doing of any reserved acts.

²²⁰ *CCA*, *supra* note 1, s 30.6 b.

mandatory nature bring an important perspective to the discussion further below in this chapter.²²¹ First, however, I will look into another copyright user right that pertains specifically to computer programs and refer to other permitted acts in the *CCA*.

E. Computer programs and other permitted acts

Computer programs form an important part of the copyright works that are commercialized to consumers. I cannot omit referring to user rights pertaining to computer programs, but due to the specificity and narrow scope of these rights, I will limit my comments to a brief description of their nature. In addition to the user rights explored so far, copyright consumers and other users can perform certain acts on the copies of computer programs they lawfully own or that are licensed to them, without the authorization of copyright holders.²²² The permitted acts revolve around technical issues that are specific to computer programs and to uses that are deemed essential to their proper enjoyment: conversion from one computer language to another and adaptation of the computer program to address interoperability issues, so long as such acts are performed for the consumer or user's own purposes.²²³ Unlike some of the other user rights examined so far, these permitted acts are not subject to the non-circumvention of TPMs.

In the same vein of addressing technical issues pertaining to the use and enjoyment of copyright works, the recent amendments to the *CCA* introduced another exception to copyright infringement which allows copyright users to reproduce any works, only to the extent that the reproduction is temporary and essential to a "technological process" and that it facilitates a use that does not infringe copyright.²²⁴ The meaning of technological process is not entirely clear but this user right would likely cover practices similar to "cache," which was held to be part of the acts that fall within the carrier exception to copyright infringement in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*.²²⁵

²²¹ See the discussion in Part III and Part IV of this chapter.

²²² *CCA*, *supra* note 1, ss 30.6, 30.61.

²²³ *Ibid.* In the EU, the exceptions to copyright infringement related to computer programs are set out in: EC, Council and Parliament Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs, [2009] OJ L 111/16 [*Directive 2009/24/EC*].

²²⁴ *CCA*, *supra* note 1, s.30.71.

²²⁵ *Supra* note 42 at paras 113-119, where the Supreme Court held that the practice of cache by Internet service providers fell within the exception to copyright infringement under *CCA*, *supra* note 1, s 2.4(1)(b) (restoring the Copyright Board's decision on that issue). "Cache" is the technological process (used by,

I will now turn to an important power of lawful owners of copies of copyright works that can be exercised without the authorization of copyright holders: i.e., the right to transfer the ownership rights in the copy pursuant to the exhaustion of the distribution right or first sale doctrine.

F. Exhaustion or first sale doctrine

A review of acts that copyright consumers can perform without the authorization of copyright holders would be incomplete without a discussion of the exhaustion or first sale doctrine.²²⁶ This is the rule by which once the first sale of physical objects embodying copyright works (such as a book, DVD, or a music CD) has occurred with the authorization of the copyright holder, they cannot dictate the fate of subsequent transfers of that object.²²⁷ The exhaustion or first sale doctrine can be invoked only by lawful owners of copies of copyright works and not by licensees, borrowers or people who otherwise access copies of copyright works.²²⁸ It restricts copyright holders' exclusive distribution rights and does not apply to other exclusive rights, e.g., the right to reproduce the work or to communicate the work to the public by telecommunication.²²⁹ In essence, the exhaustion or first sale doctrine allows copyright consumers who own copies of copyright works to exercise one of the basic powers and privileges of ownership, i.e., to transfer their rights in the copies to another party.

Copyright holders' right of distribution is the exclusive right to authorize the transfer of

among others, Internet service providers) of temporarily reproducing Internet content to accelerate and improve its access and use: *ibid*, at para 23.

²²⁶ The doctrine is known as the first sale doctrine in the US and as the principle of exhaustion in other jurisdictions.

²²⁷ At the copyright international law level, see the *WIPO Copyright Treaty*, 20 December 1996, WO033EN, online: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P8_189 [*WCT*], art 6; and the *WIPO Performances and Phonograms Treaty*, 20 December 1996, WO034EN, online: http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html [*WPPT*], art 8. *WCT* and *WPPT* are commonly referred to as the *WIPO Internet Treaties*. In Canada, the exclusive distribution right and its exhaustion were introduced in 2012 by the *CCMA*, *supra* note 75, which amended the *CCA*, *supra* note 1, ss 3, 15 and 18. In the US, see 17 U.S.C. §109 (a). See also US Copyright Office, *A Report of the Register of Copyrights pursuant to section 104 of the DMCA* (2001) online: http://www.copyright.gov/reports/studies/dmca/dmca_study.html [*DMCA 2001 Report*] at 22-23.

²²⁸ *Ibid*.

²²⁹ *Ibid. DMCA 2001 Report*, *supra* note 227 at 79-80.

ownership of the original or copies of a work, independently of any act of reproduction. It has been traditionally associated with other rights pertaining to the physical copies, including the *droit de suite* and rental right, for its specific control and effects on the tangible property of the copy owner in which the work is embedded.²³⁰ Arguably, the distinction between these rights and other copyright exclusive rights is disappearing when works are embedded in digital copies. Because of the ease with which other copyright reserved acts can be performed on digital copies of copyright works, restrictions on the right to reproduce or communicate to the public are becoming as intrusive in the property rights of the digital copy owner as restrictions on the right to transfer or rent the digital copy.

While the distribution right and the first sale doctrine have been well established in US copyright law with the codification of the early 20th century Supreme Court judgment *Bobbs-Merrill Company v. Isidor Straus*,²³¹ until recently it was not part of the domestic law of several jurisdictions including Canada.²³² It started to change when the exclusive right of distribution made its official entry in international copyright law with the adoption of the *WIPO Internet Treaties* in 1996.²³³ Prior to the amendments of the *CCA* in 2012, there was no reference to the exclusive distribution right, except as a secondary infringement, or to the exhaustion or first sale doctrine.²³⁴ Until then, a copyright holders' exclusive right was limited to their right to authorize the first publication of their work, which has been described as a right of first distribution that

²³⁰ See for example Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights, The Berne Convention and Beyond*, 2nd ed. (Oxford: Oxford University Press, 2006) vol 1, para 11.38, who discuss the distribution right as part of "Rights pertaining to physical copies"; Pierre-Emmanuel Moyse, *Le droit de distribution: Analyse historique et comparative en droit d'auteur* (Cowansville, Québec: Les Éditions Yvon Blais, 2007) 358 describes the right of rental and the right of destination under French law as forms of rights of distribution.

²³¹ 210 U.S. 339, 28 S.Ct. 722 (1908). First sale doctrine was codified in the year following this judgment: 17 U.S.C. § 27 and was carried forward in section 109(a) of the *An Act for the general revision of the Copyright Law* (1976) *supra* note 96. It is now found in 17 U.S.C. §109 (a).

²³² Paul Goldstein & Bernt Hugenholtz, *International Copyright Principles, Law, and Practice*, 2nd ed. (Oxford: Oxford University Press, 2010), at 303-305. In continental Europe, the German scholar Joseph Kohler developed this principle at the end of the 19th century, a principle which was later followed by the German Supreme Court for trademarks, patents, and copyright: Herman Cohen Jehoram, "Prohibition of Parallel Imports Through Intellectual Property Rights" (1999) 30 *International Review of Intellectual Property and Competition Law* 495 at 498. For a comparative law analysis of the right of distribution see: Moyse, *supra* note 230. In Canada, the exclusive distribution right and its exhaustion were introduced in 2012 by the *CCMA*, *supra* note 75, which amended the *CCA*, *supra* note 1, ss 3, 15 and 18.

²³³ *Supra* note 227. *WCT*, *supra* note 227, art. 6 and *WPPT*, *supra* note 227, art. 8.

²³⁴ *CCA*, *supra* note 1, s 27(2). The *CCMA*, *supra* note 75, amended the *CCA*, *ibid*, ss 3, 15 and 18, by introducing the concept of the exclusive right to sell and of exhaustion.

does not extend to each subsequent copies put on the market for sale.²³⁵ Consequently, there was also a recognition that the doctrine of first sale applied in Canada.²³⁶ The exclusive right of distribution has been implemented in EU secondary law and is part of the national laws of its Member States, including the UK and France.²³⁷

The prevailing view is that the exclusive right of distribution and its exhaustion only apply with respect to copyright works embedded in physical tangible objects and does not apply to digital copies of copyright works made available to consumers with no supporting physical medium exchanged from hand to hand. This is a corollary of the limitation of the exhaustion or first sale doctrine to the distribution right.²³⁸ In that view, the exhaustion or first sale doctrine does not extend to the act of reproduction of the copy or other exclusive rights that are implicated in a digital transmission, unless such acts of reproduction or other reserved acts would be allowed as ancillary to the application of the exhaustion of copyright holders' distribution right.²³⁹ The view that the exclusive distribution right and its exhaustion only apply with respect to copyright works embedded in physical tangible objects also questions whether a transfer of ownership and a sale can effectively occur with respect to digital copies downloaded online with no supporting physical media.²⁴⁰ I discuss in Chapter 8 the application of the legal concept of ownership and of sale to digital copies distributed online.

²³⁵ *CCA*, *supra* note 1, s 3(1); Vaver, *Intellectual Property Law 2011*, *supra* note 5 at 155-157. For his part, Moyse, *supra* note 230 at 384 assimilates the right of publication to a right of divulgation.

²³⁶ *Théberge*, *supra* note 16 at para 31, Binnie J. for the majority: "Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it." For a discussion on the application of the doctrine of exhaustion in Canadian, US, and European patent, copyright and trademark law, see Jeremy de Beer & Robert Tomkiewicz "Exhaustion of Intellectual Property Rights in Canada" (2009) 25 C.I.P.R. 3.

²³⁷ EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society*, [2001] OJ, L167/10 [*Directive 2001/29/EC*], art. 4; *Directive 2009/24/EC*, *supra* note 223, art. 4 1 (c); see also: *UKCDPA*, *supra* note 27, s. 18(3); art L122-3-1 CPI.

²³⁸ See *DMCA 2001 Report*, *supra* note 227 at 79-80; *Capitol Records, LLC v ReDigi Inc.*, 2013 WL 1286134 (S.D.N.Y.) at 9-11.

²³⁹ This is in effect what the Court of Justice of the EU did in *UsedSoft GmbH v Oracle International Corp*, C-128/11, [2012] OJ C 287 at 10 [*UsedSoft*] para 52, with respect to the exclusive right to communicate to the public by holding that the distribution of the work effectively transformed the communication to the public into such distribution: I discuss this judgment in Chapter 8 Part III.

²⁴⁰ See *DMCA 2001 Report*, *supra* note 227 at 86-87, where the US Register of Copyright qualifies the presence of a physical object embedding the copyright work as a defining element for the application of the first sale doctrine.

Article 6 of *WCT* and article 8 of *WPPT* impose on their member states the substantive minima to confer an exclusive distribution right to copyright holders for their literary and artistic works (or of their performances fixed in phonograms in the case of *WPPT*), i.e., to authorize “the making available to the public of the original and copies of their works through sale or other transfer of ownership.”²⁴¹ They leave it up to member states to determine the application of exhaustion “after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.”²⁴² The agreed statement concerning these articles specifies that the copies that are subject to the right of distribution refer exclusively to “fixed copies that can be put into circulation as tangible objects.”²⁴³ On that basis, commentators argue that the effect of the *WIPO Internet Treaties* is to exclude the application of the exhaustion of the distribution right to digital copies of copyright works distributed online.²⁴⁴ The implementation of the *WIPO Internet Treaties* or existing law of member states, including the US,²⁴⁵ the EU,²⁴⁶ and recently Canada,²⁴⁷ tends to confirm that interpretation.²⁴⁸

²⁴¹ *WCT*, *supra* note 227, art 6. See also *WPPT*, *supra* note 227, art 8.

²⁴² *Ibid.*

²⁴³ *WCT*, *supra* note 227, Agreed statement concerning arts 6 and 7.

²⁴⁴ See André Lucas, “International exhaustion”, in Lionel Bently, Uma Suthersanen & Paul Torremans, eds, *Global Copyright Three Hundred Years Since the Statute of Anne, From 1709 to Cyberspace* (Cheltenham: Edward Edgar Publishing, 2010) 304, at 309ff. The author argues *WCT*, *supra* note 227, art 6, read in conjunction with art 8, closed the path to the application of an immaterial exhaustion principle. See also Moyse, *supra* note 230 at 559-562.

²⁴⁵ Marybeth Peters, “The Legal perspective on exhaustion in the borderless era: consideration of a digital first sale doctrine for online transmissions of digital works in the United States” in Lionel Bently, Uma Suthersanen & Paul Torremans, eds, *Global Copyright Three Hundred Years Since the Statute of Anne, From 1709 to Cyberspace* (Cheltenham: Edward Edgar Publishing, 2010) 329, at 331, citing the *DMCA 2001 Report*, *supra* note 227 at 80, 97. See also *Capitol Records, LLC v ReDigi Inc.*, 2013 WL 1286134 (SDNY) at 9-11.

²⁴⁶ *Directive 2001/29/EC*, *supra* note 237. The conclusion is made from the application of art 4.2 in conjunction with recitals 28 and 29 to the Preamble. See Lucas, *supra* note 244 at 309ff.; Tomasz Targosz, “Exhaustion in digital products and the ‘accidental’ impact on the balance of interests in copyright law” in Lionel Bently, Uma Suthersanen & Paul Torremans, eds, *Global Copyright Three Hundred Years Since the Statute of Anne, From 1709 to Cyberspace* (Cheltenham: Edward Edgar Publishing, 2010) 337; European Parliament, DG for Internal Policies, Policies Department: Citizens’ Rights and Constitutional Affairs, “The Relations Between Copyright Law And Consumers’ Rights From A European Perspective” by Séverine Dusollier (2010) [Dusollier 2010] at 26-27. However, see EU, Opinion Advocate General Bot, Case C-128/11, *Axel W. Bierbach, administrator of UsedSoft GmbH v Oracle International Corp.*, 24 April 2012 at paras 75-76, where the Advocate General raises doubts as to whether Directive 2001/29/EC, *supra* note 237, limits the distribution right and its exhaustion to copyright works embodied in physical objects. See also the discussion in Chapter 8 on *UsedSoft*, *supra* note 239, where the Court of Justice of the European Union (Grand Chamber) held that exhaustion applied to digital copies of computer programs that are not embedded in a physical object.

The non-application of the exhaustion or first sale doctrine to digital copies of copyright works distributed online would limit its application significantly in light of this increasingly prevalent method of distribution of copies of copyright works. The limited scope of application of the exhaustion or first sale doctrine raises the following questions: what is the rationale for the requirement that a physical object be exchanged from hand to hand for the exclusive distribution right and its exhaustion and is it justifiable? The answer to these questions has many ramifications that I discuss in subsequent chapters. They include: looking at the first sale or exhaustion doctrine through the lens of property law and theory,²⁴⁹ evaluating the distinction between tangible and intangible and between goods and services under sale of goods and consumer law,²⁵⁰ and understanding the various exclusive rights that are involved in the commercialization of copies of copyright works distributed online.²⁵¹

The application of the exhaustion or first sale doctrine to commercial copies of copyright works is limited by another factor. As it only applies to lawful owners of copies of copyright works, there is a well-documented practice by which copyright holders have circumvented and continue to circumvent the application of the doctrine by licensing the copy of the work and not selling it.²⁵²

²⁴⁷ *CCMA*, *supra* note 75, introduced the exclusive distribution right and the principle of exhaustion in the *CCA*, *supra* note 1, ss 3, 15 and 18 refer to work (or other subject matter of copyright) “that is in the form of a tangible object”.

²⁴⁸ In particular, the implementation by the EU goes one step further than the *WIPO Internet Treaties* in emphasizing the need for the transfer of a tangible object embedding the copyright work for the rule of exhaustion to apply: *Directive 2001/29/EC*, *supra* note 237. The conclusion is made from the application of art 4.2 in conjunction with Preamble, recitals 28 and 29 that respectively provide: “4.2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the right holder or with his consent,” “(28) Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the right holder or with his consent exhausts the right to control resale of that object in the Community...” and “(29) The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the right holder.”

²⁴⁹ See the discussion in Chapter 7 Part III A (ii) and Part III B.

²⁵⁰ See the discussion in Chapter 8 Part II.

²⁵¹ See the discussion in Chapter 8 Part III.

²⁵² Jean Braucher, “Contracting out of Article 2 Using a ‘License’ Label: a Strategy that should not Work for Software Products” (2007) 40 *Loy. L.A. L. Rev.* 261, at 271-272; Glen. O. Robinson, “Personal Property Servitudes”, 71 *U. Chi. L. Rev.* 1449, at 1473-1474.

This practice has been established for some time with respect to copies of computer programs²⁵³ and is increasingly present for copies of copyright works that are distributed online.²⁵⁴

Licences are the vehicle of intellectual property right holders to grant authorizations by contract to perform certain acts (as it is often the case for software) that would otherwise not be permitted by the application of the property regime created by the *CCA* or other relevant laws.²⁵⁵ Licences are not required and have not been traditionally present in a multitude of commercial transactions involving the transfer hand to hand of copies of copyright works, such as the sale of a book, film DVD, or music CD. In those cases, copyright holders rely primarily on the default property regime instituted by the *CCA*.

Should copyright holders' privileges and powers extend to controlling subsequent transfers of copies of copyright works lawfully acquired by consumers and if so on what basis? The uncertain contours of the application of exhaustion or first sale to digital copies of copyright works, coupled with how copyright holders can avoid its application altogether by contract, raise important questions at the heart of copyright's operation and design. What is the purpose and main function of exhaustion in copyright law?²⁵⁶ Can its application be subject to copyright holders' commercial practices or is there a need to preserve the exhaustion or first sale doctrine for the benefit of copyright consumers, as well as to maintain the coherence of property and copyright law?²⁵⁷

The exhaustion or first sale doctrine is probably one of the most misunderstood of all copyright consumers' rights and one with a most uncertain future. It extinguishes the application of the exclusive right of distribution, a lesser-known copyright than the exclusive right to reproduce or to perform a work in public. It confronts the expanding scope of copyright in recent years to traditional principles of property, by touching upon a sensitive nerve of copy ownership, i.e., the

²⁵³ *Step-Saver Data Systems, Inc. v Wyse Technology*, 939 F.2d 91 (3d Cir.1991); *Softman Products Company v Adobe Systems Inc.*, 171 F.Supp.2d 1075, 45 UCC Rep.Serv.2d 945 (C.D. California 2001) both refer to the historical background of computer software licensing practices in the US; Robinson, *supra* note 252, discusses the history of software licensing commercial practices going back to the 1960s.

²⁵⁴ See the discussion on non-negotiated standard end-user agreements for copies of copyright works sold online in Part III C of this chapter.

²⁵⁵ Such as under the *Patent Act*, R.S.C., 1985, c. P-4, the *Trade-marks Act*, R.S.C., 1985, c. T-13 or *Industrial Design Act*, R.S.C., 1985, c. I-9.

²⁵⁶ I discuss the theoretical justifications of the exhaustion or first sale doctrine in Chapter 7 Part III A (ii).

²⁵⁷ See the discussion on the standardization of property as applied to commercial copies of copyright works in Chapter 7 Part IV.

basic right to transfer freely one's copy to another party without any duty to account to anyone. That right is now potentially in peril, either because it does not apply to copies distributed online with no supporting physical media, or because of copyright holders' commercial practices that seek to circumvent the application of the exhaustion or first sale doctrine.²⁵⁸

Understanding the magnitude of copyright holders' ability to shape the user rights discussed so far in this chapter through contract is critical for a clearer view of the acts that consumers can actually perform on copyright works and the dilemmas they face. Copyright holders' contracts with end-users also raises broader policy design questions on the effects of copyright holders' commercial practices, including the use of TPMs on the primary objectives of copyright law. This is what I turn to next.

III. The nebulous interaction between copyright, contracts, and Technological Protection Measures (TPMs)

A. Copyright public policy meets copyright holders' private rights

The interaction between copyright, contracts, and TPMs raises the most complex and pressing issues in contemporary copyright law. The interaction between copyright, contracts, and TPMs puts in question the desirable scope of the private rights created by copyright law and the public policy goals that it promotes, as well as the proper level of flexibility that needs to be granted for the commercial exploitation of copyright. In Canada, copyright has been described as a pure creation of statute²⁵⁹ that is a matter of federal jurisdiction.²⁶⁰ The *CCA* sets the default rules of copyright holders' exclusive rights in their works that are opposable to all.²⁶¹ This includes the exclusive right of copyright holders to authorize any of the acts specifically reserved to them by the *CCA*.²⁶² Copyright holders control the exploitation of their exclusive rights and

²⁵⁸ See the discussion in Chapter 7 Part IV.

²⁵⁹ *Compo Co. v Blue Crest Music Inc.*, [1980] 1 SCR 357 (SCC), subsequently applied in numerous Supreme Court judgements: see *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, *supra* note 42 at para 82. I discuss the nature of copyright in Chapter 5.

²⁶⁰ *Constitution Act, 1867* (UK), 30 & 31 Vict., c 3, reprinted in RSC 1985, App II, No 5, s. 91(23).

²⁶¹ *CCA*, *supra* note 1, ss 27ff.

²⁶² *Ibid*, ss 3, 15, 18, 21, 26.

commercialization of their works by granting authorizations including through contracts. In the absence of explicit contract terms, the default rules of the *CCA* will apply and some terms may be implied between the parties based on the relevant circumstances.²⁶³ In consumer transactions, copyright holders resort increasingly to non-negotiated standard end-user agreements.²⁶⁴ Copyright holders can also control the commercialization of their works by applying TPMs that, in their effect, are comparable to contract terms and raise distinct issues and debates within and outside copyright law.²⁶⁵

As much as the *CCA* confers exclusive rights on copyright holders, it is by its own design and purpose an incomplete code: more often than not, copyright holders resort to contracts as a vehicle to tailor their copyright to the particular needs of the transaction.²⁶⁶ This occurs at two levels. First, authors conclude contracts for the exploitation of their economic intangible rights with publishers, music producers, film-makers, etc. They can assign or license their copyright, in whole or in part, including with respect to the list of their exclusive rights, territory, or the duration of their copyright. The *CCA* explicitly contemplates this panoply of scenarios.²⁶⁷ These agreements address the exploitation of the intangible exclusive rights of authors/copyright holders. Second, authors, but most frequently copyright holders, conclude contracts for the

²⁶³ With respect to implied licences see: Vaver, *Intellectual Property Law 2011*, *supra* note 5 at 137-141; Robert Bradgate, "Consumer rights in digital products" 2010, online: http://www.google.ca/search?sourceid=navclient&ie=UTF-8&rlz=1T4ADBF_enCA275CA275&q=Bradgate%2c+Consumer+rights+in+digital+products+2010 at 37.

²⁶⁴ I discuss the nature and content of non-negotiated standard end-user agreements through which copies of copyright works are commercialised in Part III C of this chapter.

²⁶⁵ TPMs are comparable to contracts in effect because the physical restrictions they impose on copyright works can be analogised to a contractual restriction on the copyright work. They are different from contractual limitations in that they do not only affect the parties to the contract. They affect all users of the copyright work including subsequent assignees of the copy of a copyright work to which a TPMs apply. See the discussion on the nature and effects of TPMs in Part III B of this chapter.

²⁶⁶ See *CCA*, *supra* note 1, s 13(4); *Théberge*, *supra* note 16 at para 12; As the Supreme Court of Canada noted in *Robertson v Thomson Corp.*, 2006 SCC 43, at paragraph 58: "parties are, have been, and will continue to be, free to alter by contract the rights established by the *Copyright Act*." In *Kraft Canada Inc. v Euro Excellence Inc.*, 2007 SCC 37 at para 117, per Abella J. (to which Chief Justice Mac Lachlin concurred, as well as Bastarache, Lebel and Charron JJ. on this particular issue): "Other cases illustrate that a copyright holder's ability to alienate its interest either through licensing or assignment is perfectly consistent with the statutory scheme. Vertical and horizontal divisibility is, arguably, a hallmark of copyright: see *Bouchet v. Kyriacopoulos* (1964, 45 C.P.R. 265 (Can. Ex. CT))." In a US context, see David Nimmer, Elliot Brown & Gary N. Frischling, "The Metamorphosis of Contract into Expand" in David Nimmer, in *Copyright, Sacred Text, Technology and the DMCA* (The Hague, Netherlands: Kluwer Law International, 2003) 267 at 274 (reproducing an article by the same title initially published in (1999) 87 Cal. L. R. 17).

²⁶⁷ *CCA*, *supra* note 1, s 13(4).

commercialization of copies of the copyright works that generally dictate what users are allowed to do with the copies. These contracts are commonly referred to as “shrink wrap,” “browse wrap,” “click wrap,” or end-user licence agreements.²⁶⁸ In a consumer context, they are typically non-negotiated standard end-user agreements. This second category of contract is the one that is relevant when defining consumers’ rights to copies of copyright works. It is one specific application of the *exploitation* of the intangible rights conferred by copyright that addresses the *enjoyment* of copies of copyright works. This is the area where the incompleteness of the copyright code is most apparent, leading to uncertainty about the effects and proper treatment of the interaction between the *CCA* and the contracts for the commercialization of copies of copyright works. It concerns the exclusive distribution right that was only added recently in Canada to copyright holders’ exclusive rights.²⁶⁹

In Canada, the *CCA* has been described by the Supreme Court in *Théberge* as the balance between “promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.”²⁷⁰ How does (should) the law treat contracts for the commercialization of copyright works that expand the exclusive rights and powers of copyright holders or go against the objectives of the *CCA* or similar constitutive acts? How do we make that assessment? To what extent is an expansion through contract the normal exercise of freedom of contract and of privileges and powers of copyright holders and to what extent is it outside their prerogative or need to be constrained? Should we make a distinction between non-negotiated and negotiated agreements, mass-market commercialization and isolated occurrences?

The proliferation of the commercialization of copies of copyright works through non-negotiated standard end-user agreements, combined with the use of TPMs, has been widely commented upon by authors, including Margaret Jane Radin, Niva Elkin-Koren, and Jacques De Werra, as occasioning the “privatization of copyright” or as the techno-governance phenomenon.²⁷¹ The fear

²⁶⁸ For a description of the various types of standard form agreements of digital products, see: Loos & al., *supra* note 60 at 65-66. For a summary of the various scenarios under which digital products are distributed see: Bradgate, *supra* note 263 at 32.

²⁶⁹ See the discussion on the exhaustion or first sale doctrine and distribution right in Part II F of this chapter.

²⁷⁰ *Théberge*, *supra* note 16 at para 30.

²⁷¹ Marc A. Lemley, “Beyond Preemption: The Law And Policy Of Intellectual Property Licensing” (1999) 87 Cal. L. Rev. 111; Charles R. McManis, “The Privatization (“Shrink-Wrapping”) of American Copyright

is that through non-negotiated standard end-user agreements or TPMs, copyright holders supersede the pre-existing copyright regime and expand their privileges and powers.²⁷² These concerns fit in the broader discussion of the perception by users that standard form agreements exemplify the norm, as illustrated by behavioural law and economics research.²⁷³ Superseding the copyright regime can occur through restrictive terms that also apply to works that are in the public domain, or that make exceptions to copyright holders' exclusive rights no longer effective. For example, contract terms or TPMs can limit users' ability to make a fair dealing or fair use of a work that allow users to, *inter alia*, exercise their freedom of expression through criticism, review, or parody.²⁷⁴ Its effects on the balance objectives of copyright law become significant in a standardized environment where the commercial practice is widespread.

The commercialization of copyright works through non-negotiated standard end-user agreements is not a new phenomenon. It became prevalent with respect to the commercialization of computer

Law" (1999) 87 CALR 173; See for example, Niva Elkin-Koren, "A Public-Regarding Approach to Contracting over Copyrights", in R. Cooper-Dreyfuss, D. Leenheer Zimmerman & H. First eds., *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001) 191 at 195; Margaret Jane Radin, "Regime Change in Intellectual Property: Superseding the Law of the State with the "Law" of the Firm" (2003-2004) U. Ottawa L. & Tech. J. 173; Jacques De Werra, "Moving Beyond The Conflict Between Freedom Of Contract And Copyright Policies: In Search Of A New Global Policy For On-Line Information Licensing Transactions" (2003) 25 Colum. J.L. & Arts 239. For an analysis of the complex interplay between copyright law, contract and technology, see generally Daniel Gervais, "The Price of Social Norms: Towards a Liability Regime for File-Sharing" (2004) 12 J. Intell. Prop. L. 39. This interaction is addressed in the context of authors rights in: Giuseppina D'Agostino, *Copyright, Contracts, Creators, New Media, New Rules* (Cheltenham, UK: Edward Elgar Publishing, 2010) in particular, chapters 6 to 9 (112-200); Nicola Lucchi, "The Supremacy of Techno-Governance: Privatization of Digital Content and Consumer Protection in the Globalized Information Society" (2007) 15 International Journal of Law and Information 192 at 194; Jens Schovsbo, Integrating Consumer rights into Copyright law: From the European Perspective (2008) 31 J Cons Policy 393 at 398; Eduardo Moises Penalver & Sonia K. Katyal, *Property Outlaws* (New Haven: Yale University Press, 2010) at 46-51.

²⁷² Natali Helberger et al., "Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Discussion of Consumer Concerns and Expectations" (2004), online: http://www.indicare.org/tiki-download_file.php?fileId=111, at 117.

²⁷³ In particular, how default rules (and in the present case standard end-user agreements) both respond and construct social norms and have a normative effect: On Amir & Orly Lobel, "Stumble, predict, nudge: how behavioral economics informs law and policy", Book Review of *Nudge: improving decisions about health, wealth, and happiness*, by R. H. Thaler and C. R. Sunstein & *Predictably irrational: the hidden forces that shape our decisions*, by D. Ariely, (2008) 108 Colum. L. Rev. 2098, at 2121-2122. I discuss some ramifications of behavioral law and economics theory as part of the justifications of selected consumer protection obligations in Chapter 10.

²⁷⁴ Elkin-Koren, *supra* note 271 at 197, where the author notes that the public interest or public domain is an absent consideration in individualized market transactions and that the promotion of these interests can not be left to the will of market forces alone. I discuss the fair dealing, fair use exceptions to copyright infringement in Part II C of this chapter.

programs in the sixties at a time when their legal protection through copyright was not yet certain.²⁷⁵ In that context, it was deemed necessary to seek additional protection through contract.²⁷⁶ Until recently, books, music, and films were commercialized without exhaustive terms and conditions. The landscape is changing with the commercialization of these works through online means of distribution,²⁷⁷ which can also include TPMs.²⁷⁸ Given the current protection of books, music, and films under copyright law and the fact that they have been traditionally commercialized without terms and conditions, one would assume that contract clauses that dictated permitted uses of copies would be superfluous, unless copyright holders authorize consumers to perform more acts on their work than the *CCA* allows. Conversely, it would be suspicious if they constrain consumers to perform fewer acts on their works than the *CCA* allows.

The potential detrimental effects of the proliferation of non-negotiated standard end-user agreements and TPMs on the statutory rights created by the *CCA* and similar statutes worldwide give rise to various fields of inquiry. One is the extent to which existing doctrines in copyright, contract, or competition/antitrust law provide mechanisms that can effectively respond to the expansionism of copyright through standardized contracts.²⁷⁹ A second one, which I discuss in Part IV of this chapter, questions the nature of exceptions to copyright infringement and whether they are mandatory, in which case contract terms to the contrary are unenforceable.²⁸⁰ A third one is the extent to which terms and conditions delineate the exclusive rights of copyright holders or are contractual terms distinct from copyright holders' exclusive rights.²⁸¹

²⁷⁵ See: Robinson, *supra* note 252 at 1473-1474.

²⁷⁶ *Ibid.*

²⁷⁷ I discuss the nature and scope of online non-negotiated standard end-user agreements in Part III C of this chapter.

²⁷⁸ See the discussion in Part III B of this chapter.

²⁷⁹ Lemley, *supra* note 271; Elkin-Koren, *supra* note 271; Lucie Guibault, *Copyright Limitations and Contracts, An analysis of the Contractual Overridability of Limitations on Copyright* (The Hague: Kluwer Law International, 2002) at 241-289; see also de Werra, *supra* note 271, who presents a comparative overview between the US and Europe of looks at how legal doctrines within and outside copyright law respond to the alteration by contract of copyright as conferred by statute. On the limits of doctrines outside copyright law to address the balancing act of competing interests around copyright see Dreier, *supra* note 6 at 309-312.

²⁸⁰ Guibault, *supra* note 279; Estelle Derclaye, "Copyright Contracts, Public Policy and Antitrust, in Christopher Heath and Kung-Chung Liu (eds.), *Copyright Law and the Information Society in Asia*, IIC Studies (Hart Publishing: Oxford, 2006) 167-226; UK, Strategic Advisory Board for Intellectual Property, *The relationship between copyright and contract law*, by Martin Kretschmer, Estelle Derclaye, Marcella Favale & Richard Watt, 2010, online: <http://www.ipo.gov.uk/ipresearch-relation-201007.pdf>.

²⁸¹ I.e. contract terms that are the exercise of copyright holders' exclusive right to authorize reserved acts as opposed to contract terms that are distinct from copyright holders' exclusive rights.

Commentators have looked at how various doctrines, within and outside copyright law, provide remedies to copyright users and consumers in the case of contracts (in particular, non-negotiated standard end-user agreements) that tend to expand copyright's exclusive powers and privileges beyond the statute that creates them.²⁸² They include the application of the US doctrine of preemption,²⁸³ and more generally of constitutional fundamental rights,²⁸⁴ of copyright misuse,²⁸⁵ public policy,²⁸⁶ unconscionability,²⁸⁷ competition and antitrust law,²⁸⁸ and the doctrine of *abus de droit* in the civil law jurisdictions.²⁸⁹ While these doctrines may provide a legal basis for copyright users' claims in specific cases, they are either too broad or too narrow to address the specific issues and effects of copyright end-user agreements.²⁹⁰ They provide little guidance and support to copyright users.²⁹¹ The detailed analyses of the application of these legal doctrines to the commercialization of copyright works underscore the distorting pressures that private ordering can exercise on the copyright house. They illustrate the power that the sphere of private ordering enables for copyright holders, with little countervailing force to integrate public interest considerations and with that, the ability of lawful users to perform certain acts on copyright works. In Chapters 8 through 11, I address the application of similar doctrines as they exist in consumer protection law and whether they are likely to offer more support to copyright consumers in the context of defining consumers' rights and permitted uses of copies of copyright works.

To sum up, the interaction between the copyright regime and contracts raises complex issues because it questions the purpose and objectives of copyright, what its proper scope should be, and how much flexibility is desirable in how copyright is exploited and commercialized. The *CCA*

²⁸² In particular, Elkin- Koren, *supra* note 271; Lucchi, *supra* note 271; de Werra, *supra* note 271.

²⁸³ I.e. the US based federal doctrine of statutory preemption: 17 USC, § 301, supremacy clause preemption or constitutional preemption: see de Werra, *supra* note 271, at 263-273, and the doctrine of contractual preemption: see *DMCA 2001 Report*, *supra* note 227 at 162-164; see also David Nimmer, Elliot Brown & Gary N Frischling, *The Metamorphosis of Contract into Expand* (1999) 87 Cal. L. R. 17 at 40-68; Elkin-Koren, *supra* note 271 at 215.

²⁸⁴ Guibault, *supra* note 279 at 263-277.

²⁸⁵ *Ibid.*, at 284-289; De Werra, *supra* note 271 at 273-279.

²⁸⁶ *Ibid.*, at 279-282.

²⁸⁷ *Ibid.*, at 282-286; Lucchi, *supra* note 271 at 221ff.

²⁸⁸ Guibault, *supra* note 279 at 242-251; De Werra, *supra* note 271 at 286-291.

²⁸⁹ Guibault, *supra* note 279 at 278-283; De Werra, *supra* note 271 at 338-339. On the application of the doctrine of *abus de droit* to copyright, see also: Pierre-Emmanuel Moyse, "Kraft Canada c. Euro-Excellence : l'insoutenable légèreté du droit" (2008) 53 R D McGill 741, at 784-791.

²⁹⁰ De Werra, *supra* note 271 at 263-294, 338-339, 345-346.

²⁹¹ *Ibid.*

and similar copyright laws in other jurisdictions say little about this interaction if it is not to endorse an unrestricted freedom of exploitation. The fear is that through non-negotiated standard end-user agreements or TPMs, copyright holders supersede the pre-existing copyright regime to their advantage to expand their privileges and powers to the detriment of other competing interests that are addressed in the *CCA* and similar statutes in other jurisdictions.²⁹² The use of TPMs by copyright holders is a manifestation of the possible extension of copyright through private ordering. The legal protection of TPMs recently introduced in the *CCA* raises specific issues that I explore next.²⁹³

B. Technological Protection Measures (TPMs)

One of the greatest controversies in contemporary copyright law is around how the implementation of provisions to protect technological measures as required by the *WIPO Internet Treaties* of 1996 disturbs (or not) the fragile balance that needs to subsist between copyright holders' exclusive rights and the rights of copyright users to copyright works.²⁹⁴ The *WIPO Internet Treaties* require member states²⁹⁵ to provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures" used by copyright holders with respect to digital works.²⁹⁶ Similar earlier forms of protection existed in the US and

²⁹² Marc A. Lemley, *supra* note 271; McManis, *supra* note 271; See for example, Elkin-Koren, *supra* note 271 at 195; Radin, *supra* note 271; De Werra, *supra* note 271. For an analysis of the complex interplay between copyright law, contract and technology, see generally Gervais, *supra* note 271. This interaction is addressed in the context of authors rights in: D'Agostino, *Copyright, Contracts, Creators*, *supra* note 271, in particular, chapters 6 to 9 (112-200); Lucchi, *supra* note 271 at 194; Schovsbo, *supra* note 271 at 398; Penalver & Katyal, *supra* note 271 at 46-51.

²⁹³ *CCMA*, *supra* note 75, which amended the *CCA*, *supra* note 1 by adding ss 41ff.

²⁹⁴ For a Canadian perspective on the digital agenda of the *WIPO Internet Treaties*, and particularly the TPMs provisions, see Michael Geist, ed., *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) in particular chapter 7: Carys Craig, "Locking out lawful users: Fair Dealing and anti-circumvention in Bill C-32" and chapter 8: Michael Geist, "The Case for Flexibility in Implementing the *WIPO Internet Treaties*: An Examination of the Anti-Circumvention Requirements."

²⁹⁵ *WCT*, *supra* note 227 and *WPPT*, *supra* note 227 had respectively 90 and 91 member states as per the WIPO official website reporting of contracting parties: <http://www.wipo.int/treaties/en/> (last visited April 7, 2013). Canada was a signatory but was not yet listed as a ratifying party. Member states include the US, the EU and Member States of the EU, China, Japan, Australia, and The Russian Federation.

²⁹⁶ *WCT*, *supra* note 227, art 11; *WPPT*, *supra* note 227, art 18.

in the EU with respect to specific uses and types of copyright works.²⁹⁷ The *WIPO Internet Treaties* impose no counterbalancing obligation on member states to preserve users' exercise of permitted acts on copyright works without the permission of the copyright holders, such as through fair use, fair dealing, and other long-established exceptions to copyright infringement.²⁹⁸

The *WIPO Internet Treaties*' obligations to protect technological measures fall within the broader digital agenda initiated by the World Intellectual Property Organization [WIPO] that seeks to address "the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works."²⁹⁹ More than 15 years after the adoption of TPMs in the *WIPO Internet Treaties*, the earlier passions ignited by their introduction are still alive, as illustrated by Canada's various attempts at copyright legislative reform that finally led to the entry into force of the *CCMA* in 2012.³⁰⁰

The controversy around TPMs forms part of the broader debate on the proper balance that needs to exist between the exclusive rights of copyright holders and the public interest, including the

²⁹⁷ EC, Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122, 17/05/1991 P. 0042, art 7 (1) (c); 17 USC, § 1002 with the entry into force of the *The Audio Home Recording Act*, Pub. L. 102-563, 106 Stat. 4237 (1992), which amended 17 USC in 1992.

²⁹⁸ On how this topic and how this void do not allow a balance to subsist between copyright holders and users, see David Vaver, "Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties?" (2007) Case Western L. Rev. 731 [Vaver, "From Owner Rights to User Rights"].

²⁹⁹ *WCT*, *supra* note 227, Preamble. For a discussion of the new international obligations brought on in the *WIPO Internet Treaties* with the TPMs and digital rights management provisions, and of the drafting process leading up to their adoption, see Mihaly Ficsor, *The Law of Copyright and the Internet, The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford: Oxford University Press, 2002) Part III; Ricketson & Ginsburg, *supra* note 230 at 964ff.

³⁰⁰ In Canada, TPMs occupied the larger part of the debates throughout the recent copyright legislative reform that led to the entry into force in 2012 of the *CCMA*, *supra* note 75: See IP Osgoode (www.iposgoode.ca) a *Canadian Copyright Reform resource Guide*, online at <http://researchguides.library.yorku.ca/content.php?pid=197824&sid=1657041> assembling references to commentaries that were made during the discussions on Bill C-32, a large portion of which concerned digital locks and TPMs. Carys Craig, "Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32" in *From Radical Extremism to Balanced Copyright: Canadian Copyright and the Digital Agenda*, Michael Geist, ed., (Irwin Law: Toronto, 2010) 177 ["Locking Out Lawful Users"]; Michael Geist, "The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements" in *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Irwin Law: Toronto, 2010) 222; Mihaly Ficsor, "TPMs and Flexibility ("The Ability of Bending without Breaking") – Why Should the TPM Provisions of Bill C-32 Protect Access Controls and Prohibit "Preparatory Acts" Online at <http://www.iposgoode.ca/2010/11/digital-locks-circumvention-and-the-copyright-reforms-proposed-by-bill-c-32/>.

rights of copyright users.³⁰¹ It includes conflicting views on the scope of the international obligations that the *WIPO Internet Treaties* impose on member states.³⁰² Proponents of strong TPMs argue that the additional clout to control access to and use of digital copyright works is essential to counter piracy and is the mere recognition of the principle that copyright holders have the right to control access to their copyright works.³⁰³ For supporters of TPMs, the proper balance lies in providing sufficient protection that will promote the future creation of digital copyright works to be disseminated for the benefit of users and the public. Critics argue that access controls were never part of the exclusive rights of copyright holders.³⁰⁴ They raise concerns about the effect of the legal protection of technological measures on access to copies of copyright works (which may include materials that are in the public domain) and exceptions to copyright infringement, such as fair dealing or fair use.³⁰⁵ At the wider level of digital rights management,³⁰⁶ critics fear that TPMs, as protected by law, allow copyright holders to control uses of copyright works (amount of reading, viewing, and listening) that were traditionally outside the scope of

³⁰¹ For a summary of the policy and legal debate around TPMs from the perspective of copyright holders and copyright users and the public interest, and about where the proper balance should be struck, see Peter K. Yu “Anticircumvention and Anti-Anticircumvention” (2006) 84 *Denv. U. L. Rev.* 13, in particular at 17-19.

³⁰² In the context of Canada recent copyright reform, see for example Geist, *supra* note 300, and Ficsor, *supra* note 300.

³⁰³ Jane C. Ginsburg, “Can Copyright become User-Friendly? Review: Jessica Litman, *Digital Copyright*” (2001) 25 *Colum. J.L. & Arts* 71 at 75-76.; Jane C. Ginsburg, “From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law” (2003) 50 *J. Copyright Soc’y U.S.A.* 113 at 123. The author acknowledges troubling aspects of the implementation of the *WIPO Internet Treaties* in the US through the DMCA: J. Ginsburg, “Copyright Legislation for the Digital Millennium” (1999) 23 *Colum.J.L. & Arts* 137 at 152-153.

³⁰⁴ Vaver, *Intellectual Property Law 2011*, *supra* note 5 at 199; Craig, “Locking Out Lawful Users”, *supra* note 300 at 197. Séverine Dusollier, *Droit d’auteur et protection des oeuvres dans l’univers numérique*, 2d ed. (Bruxelles: Larcier, 2007) [Dusollier 2007] at 384-385, 394-395, argues that the right to control access to the work resides with the owners of the physical embodiment of the work, not copyright holders.

³⁰⁵ David Nimmer, “A Riff on Fair Use in the Digital Millennium Copyright Act” (2000) 148 *U. Pa. L. Rev.* 673, at 739-740, observes: “The lengthy analysis of how section 1201 works in practice leads to the conclusion that its entire edifice of user exemptions is of doubtful puissance. The user safeguards so proudly heralded as securing balance between owner and user interests, on inspection, largely fail to achieve their stated goals. If the courts apply section 1201 as written, the only users whose interests are truly safeguarded are those few who personally possess sufficient expertise to counteract whatever technological measures are placed in their path.”; Craig, “Locking Out Lawful Users,” *supra* note 300, in particular at 195.

³⁰⁶ Digital rights management is a broader concept than TPMs that encompasses tracking uses made by copyright holders and identification codes and copyright holders’s signatures of copies of copyright works. In addition to obligations imposed on TPMs, the *WIPO Internet Treaties* impose obligations concerning rights management information (*WCT*, *supra* note 227, art 12; *WPPT*, *supra* note 227, art 19).

copyright holders' exclusive rights.³⁰⁷ I explore these concerns about controls and user limitations later on through the lens of expectations of powers and privileges relating to copy ownership of copyright works.³⁰⁸

With the entry into force of the *CCMA* in 2012,³⁰⁹ Canada opted for a higher level of protection of TPMs, similar to the highly contentious regime adopted in the US with the entry into force of the *DMCA* more than a decade earlier.³¹⁰ Countries offering a lower level of protection of TPMs include Japan, Switzerland, and New Zealand.³¹¹ The European Union set a framework of implementation for its member states that sits somewhere in the middle.³¹²

The recent amendments to the *CCA* introduced a new infringement with respect to the circumvention of access-controls but not for usage-controls.³¹³ The TPMs provisions provide a list of specific exceptions to this new infringement.³¹⁴ The Governor in Council may make regulations prescribing circumstances additional to the ones already listed in the *CCA*, in which infringement by circumventing access controls does not occur.³¹⁵ The premise behind punishing circumvention of access-controls but not usage-controls is that copyright holders should legitimately control the lawful access to their works. Once this lawful access is granted, users should be able to make any

³⁰⁷ Litman, "Lawful Personal Use" *supra* note 158 at 1872, where Litman states that lawful personal use of copyright works is progressively shrinking in the U.S. She attributes it to successive copyright reform of the last decades and the tracking powers of copyright holders with digital technologies; Niva Elkin-Koren, "Making Room for Consumers Under the DMCA" (2007) 22 Berkley Technology Law Journal, 1119, at 1143-1144, where the author describes the effect of digital rights management used by copyright holders as redefining the relationship between consumers and copyright holders in a way that is not always transparent to the consumer. It also has the potential of compromising intellectual freedoms.

³⁰⁸ In particular in Chapter 6 and Chapter 7 and through the application of consumer protection law to copies of copyright works in Chapters 8 to Chapter 11.

³⁰⁹ *CCMA*, *supra* note 75.

³¹⁰ *Digital Millenium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2860 (1998), amending 17 USC, including the introduction of §§ 1201-1205 [*DMCA*].

³¹¹ For a summary of the main features of the national implementation of TPMs in Japan, Switzerland and New Zealand, see Geist, *supra* note 300 at 233-236.

³¹² *Directive 2001/29/EC*, *supra* note 237 is the secondary law that sets the minimum requirements for EU Member States regarding the implementation of the *WIPO Internet Treaties*, *supra* note 227, and the harmonization of certain aspects of copyright law. Article 6.4 imposes an obligation on Member States to require copyright holders to make available to beneficiaries of certain exceptions or limitations to copyright, the means of benefiting from those exceptions and limitations.

³¹³ *CCA*, *supra* note 1, s 41.1(1).

³¹⁴ *CCA*, *supra* note 1, ss 41.11-41.18. The exceptions include law enforcement and interoperability issues.

³¹⁵ *CCA*, *supra* note 1, s 41.21 (2) (a). The factors that the Governor in Council would need to consider include the extent to which TPMs effectively affects the exercise of fair dealing und the *CCA*, *ibid*.

lawful use of the copyright work, including uses that do not require the consent of copyright holders (such as private copying, fair dealing, and the four new user provisions).³¹⁶ Users should not be liable for infringement if they circumvent usage-controls to achieve that goal.

At first sight, the creation of a new infringement in the *CCA* with respect to the circumvention of access-controls, but not for usage-controls, seems to strike a balance between the interests of copyright holders and copyright users by restricting infringement to the circumvention of access-controls.³¹⁷ While copyright law may not have granted access-controls to copyright holders in the past, it did not allow users to access copies unlawfully either. This latter issue was addressed in another legal sphere: the criminal theft of a chattel (e.g., copy of a book, music CD), bypassing library loan privileges, henceforth. Because it was not clear that acts of circumvention (including circumventing access-controls of copyright works) would be an actionable wrong – circumvention can take place without any taking or stealing – a new infringement of circumvention of access-controls was introduced.³¹⁸ By conferring this new legal protection for access-controls on copyright holders, the two spheres of control (i.e., rights to the physical copy and exclusive copyright) are now merged under the helm of copyright holders. The expansion of the scope of application of the *CCA* has made commentators question the constitutionality of TPMs in a copyright framework.³¹⁹

The appeal of the balance that TPMs seek to strike between diverging interests by distinguishing circumvention of access-controls from usage-controls for the purpose of infringement is short lived. While there is no infringement for circumventing usage-controls for lawful uses, as I discuss below in this chapter, the onus is entirely placed on the users' ability to circumvent the TPMs with no counterpart obligation to facilitate such uses by copyright holders.³²⁰ Makers of circumventing devices, distributors, service providers, and others are also liable for infringement,³²¹ which diminishes consumers' ability to circumvent usage-controls even more, in

³¹⁶ See Part II of this chapter.

³¹⁷ *CCA*, *supra* note 1, s 41.1(1).

³¹⁸ Vaver, *Intellectual Property Law 2011*, *supra* note 5 at 197-198; Jeremy F. de Beer, "Locks & Levies" (2006) 84 *Denver University Law Review*, 143 at 152-155.

³¹⁹ Jeremy F. de Beer, "Constitutional Jurisdiction over Paracopyright Laws" in Michael Geist, ed. *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) chapter 4; Vaver, *Intellectual Property Law 2011*, *supra* note 5 at 200.

³²⁰ See Part IV B of this chapter.

³²¹ *CCA*, *supra* note 1, s 41.1 (1) (b),(c).

spite of the lawfulness of their intended uses. Also, the infringement of access-controls under the *CCA* can occur independently of an infringement of copyright.³²² As Carys Craig notes, the legal protection of TPMs, as they now form part of the *CCA*, is blind to the lawfulness of the use.³²³ TPMs do not parallel the existing exclusive rights of copyright holders, but rather endorse an indiscriminate lockout approach.³²⁴

While advocates of TPMs will argue that this is the only effective means to counterbalance digital piracy, a legal framework that allows the combination of unfettered powers of access-controls with exclusive copyright, and that does not place the onus on copyright holders to allow lawful uses of their works by “lifting” usage-controls, tilts the balance toward copyright holders even further and imposes the burden of countering piracy on lawful copyright users. In contrast, countries granting a lower level of protection to TPMs typically link the infringement of circumvention to an infringement of copyright.³²⁵ This link was made in an effort to address the changes brought on by digital technologies, while preserving the balance between incenting innovation and promoting access and lawful uses of copyright works.

The adoption of a higher level of protection of TPMs in a Canadian context raises a slew of new questions, even 15 years after the adoption of the *WIPO Internet Treaties* and their national implementations worldwide; not the least of which is: what is the effect of the newly implemented TPMs on Canada’s copyright users’ rights, as proclaimed in *CCH* and recently confirmed by *Bell Canada* and *Alberta*? The legal protection of TPMs creates confusion around copyright holders’ obligations with respect to acts that users can perform without their authorization, such as fair dealing, under the private copying regime, and the newly introduced four user provisions.³²⁶ The confusion increases with the application of other laws to copies of copyright works, including

³²² The *CCA*, *supra* note 1 makes a distinction between acts of circumvention of access controls which are an infringement of copyright holders rights and acts of circumvention of copy controls which are not *per se* an act of infringement: s. 41.1 (1) (a). The effects of anti-circumvention measures make acts of circumvention of TPMs an infringement of copyright holders’ rights, independently of an act of copyright infringement. This is the model adopted by the U.S.: *DMCA*, *supra* note 310.

³²³ Craig, “Locking Out Lawful Users”, *supra* note 300 at 192.

³²⁴ *Ibid.*

³²⁵ Those jurisdictions include Japan, New Zealand and Switzerland: see Geist, *supra* note 300. Bill C-60, *An Act to Amend the Copyright Act*, 1st Sess, 38th Parl, 2005 (first reading 20 June 2005) cl 27, s 34.02 (1) (one of the earlier attempts to amend the *CCA*, *supra* note 1 to comply with the *WIPO Internet Treaties*, *supra* note 227) linked the infringement of circumvention to the infringement of copyright.

³²⁶ See the discussion in Part IV of this chapter.

consumer law, as I discuss subsequently in my thesis.³²⁷ Can these uncertainties be remedied through non-negotiated standard end-user agreements? How do these terms address TPMs and users' rights? This is what I explore next.

C. Contractual terms of use of commercial copies of copyright works

Copies of copyright works are made available commercially to consumers with no contractual terms attached to them³²⁸ or, increasingly, with a lengthy list of non-negotiated standard terms of use.³²⁹ In the former case, consumers' permitted uses of copies of copyright works are dictated predominantly by the application of the *CCA*.³³⁰ In the latter case, the effect of these terms of use varies depending on their enforceability,³³¹ on their interaction with copyright law,³³² and on their treatment by the relevant consumer protection laws.³³³

When consumers lawfully access copies of copyright works online, the terms of use and the general description appearing on the copyright work providers' website do not always provide

³²⁷ In particular, see Chapter 11 where I apply consumer protection law to consumer transactions of copies of copyright works through various scenarios.

³²⁸ This is the case for copies of copyright works sold with a physical supporting medium exchanged hand to hand such as books, music CDs, film DVDs and occasionally, with respect to movie streaming services online. See for example www.moviefather.com, www.moviesdatacentre.com, www.moviesister.com, www.mymovies.com.

³²⁹ This is the case for e-books, digital films and digital musical recordings made accessible online with no supporting physical medium exchanged hand to hand: see the Apple iTunes store terms of services for music downloads, film rentals and iBooks, online:

<http://www.apple.com/legal/itunes/us/terms.html#SERVICE>; Netflix terms of use for audio-visual entertainment streaming services: online at <https://signup.netflix.com/TermsOfUse> Amazon.com Kindle License Agreement and Terms of Use, online:

[http://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-](http://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-1?ie=UTF8&nodeId=200506200&qid=1336750645&sr=1-1)

[1?ie=UTF8&nodeId=200506200&qid=1336750645&sr=1-1](http://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-1?ie=UTF8&nodeId=200506200&qid=1336750645&sr=1-1) ; and KOBO INC. CANADA TERMS OF USE for the purchase of e-books, online: <http://www.kobobooks.com/termsfuse>.

³³⁰ See Part II of this chapter.

³³¹ The case law on the enforceability of terms of use varies significantly. The question to be determined *inter alia* is whether, based on the manner in which they were made available to users, it can be inferred that they were agreed to by them. For a review of the enforceability of non-negotiated terms and conditions, Loos & al., *supra* note 60 at 65-66.

³³² More specifically, whether there are provisions in copyright law that are mandatory and cannot be overridden by contract: see the discussion in Part IV of this chapter (in particular Part IV C).

³³³ The applicability and binding nature of terms of use varies depending on the applicable consumer protection laws and on the specific consumer protection obligation that is being invoked. For instance, in some jurisdictions in Canada, a consumer transaction contract has a relative value in that it is one of the factors to consider to determine whether an implied obligation of quality or fitness for use was breached: see the discussion on the nature and scope of consumer law obligations in Chapter 9.

much guidance as to whether consumers are using a service or whether they are purchasing or renting a copy of the copyright work. The line between goods and services is indeed blurrier than it ever was before because of the nature of the environment of digital copies distributed online.³³⁴ In some cases, the information that suppliers provide contradicts itself: the terms of use can refer to a service, while mentioning that consumers are “purchasing” the copy of the copyright work with no right to transfer the copy.³³⁵ Or, distributors invite consumers to “buy” a copy of a copyright work, only for consumers to find out that they are “renting” the copy.³³⁶ Terms of use generally warn consumers that the copy of the copyright work is licensed to them, without always making a distinction between the intellectual property rights that are embedded in the copy of the copyright work and the copy itself.³³⁷ The characterization of consumer transactions as transactions implicating services or goods has important ramifications on the regulation of information products.³³⁸ The qualification of consumer transactions as “licences,” including with respect to the copies of copyright works, has important implications on consumers’ rights to copies of copyright works.³³⁹ It underscores the complexity that results from the interaction between copyright, private property, and contract.³⁴⁰

There are common denominators and noticeable variances between what suppliers permit and forbid consumers to do with copies of copyright works lawfully accessed. The permitted purpose of the uses is most often defined as “personal” and “non-commercial” uses.³⁴¹ Consumers are usually forbidden to produce derivative or transformative uses with the copies of copyright works that they lawfully accessed.³⁴² Also, they have no right to transfer the copy of the copyright work that they lawfully acquired.³⁴³ Consumers are typically not notified of their rights or of copyright exceptions under copyright laws or on how they can exercise such rights.³⁴⁴ There are indications that copyright holders often disregard those users’ rights or exceptions to copyright

³³⁴ See the discussion in Chapter 8.

³³⁵ See for example the Kobo book terms of use for e-books, *supra* note 329.

³³⁶ See for example the Apple itunes terms of use for musical recordings, *supra* note 329.

³³⁷ This is the case of major suppliers of online audio, audio-visual and e-books products, see *supra* note 329.

³³⁸ See the discussion in Chapter 8.

³³⁹ *Ibid.*

³⁴⁰ See the discussion in Chapter 7 and Chapter 8.

³⁴¹ This is the case of major suppliers of online audio, audio-visual and e-books products, see *supra* note 329.

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

infringement.³⁴⁵ The right to make copies of the copy for personal non-commercial uses varies greatly from no right to make copies³⁴⁶ to the right to make an unlimited number of copies.³⁴⁷ There is also a noticeable variance in the uses of TPMs from none³⁴⁸ to ones restricting access, ones restricting uses once access is granted, and the ones restricting both the access to and the uses of copyright works. Some suppliers inform consumers of the existence of TPMs on the copies of copyright work they provide to consumers,³⁴⁹ while others make no reference to their existence.³⁵⁰

Non-negotiated standard end-user agreements tend to overlook exceptions to copyright infringement or user rights as they are set out in the *CCA* and similar statutes in other jurisdictions.³⁵¹ To understand the effect of non-negotiated standard end-user agreements on the copyright design, in particular the extent to which they can take precedence over exceptions to copyright infringement or users' rights,³⁵² requires the investigation of two related questions. What is the exact nature and scope of these permitted uses or exceptions to copyright infringement? Are they mandatory? This is what I explore next.

IV. Exceptions to copyright infringement: rights or privileges? Are they mandatory?

Whether the exceptions to copyright infringement examined above³⁵³ can qualify as rights or mere defences to copyright infringement is an important component of the broader task of defining

³⁴⁵ Hargreaves, *supra* note 60 at 51, where the author refers to a study that analysed 100 contracts referred to the British Library (i.e. submission by Libraries and Archives Copyright Alliance (LACA)) and that demonstrated that contracts and licences often override the exceptions and limitations allowed in copyright law.

³⁴⁶ See the Kobo books terms of use for e-books, *supra* note 329.

³⁴⁷ See the terms of use of the Apple iTunes store products, *supra* note 329, where no limits to copy apply to iTunes Plus Products, and users may make as many copies "as reasonably necessary for personal, non-commercial use."

³⁴⁸ See the terms of use of the Apple iTunes store products, *supra* note 329, where it is specified that a particular product, "iTunes Plus Products do not contain security technology that limits your usage of such products."

³⁴⁹ Apple iTunes store terms of use for audio, audio-visual works and e-books, *supra* note 329, make a general reference to TPMs being applied to certain of the iTunes store services.

³⁵⁰ See the Kobo books terms of use for e-books, *supra* note 329.

³⁵¹ See the overview of selected non-negotiated standard end-user agreements in Part III C of this chapter.

³⁵² I.e. as they are set out in the *CCA*, *supra* note 1 and similar statutes in other jurisdictions: see Part II of this chapter.

³⁵³ I.e. in Part II of this chapter.

consumers' rights to copies of copyright works.³⁵⁴ This question is gaining more importance for consumers as the recent amendments to the *CCA* expand the instances under which copyright users can perform acts without the authorization of copyright holders.³⁵⁵ Whether exceptions to copyright infringement are mandatory is of equal importance in an environment where copies of copyright works are increasingly commercialized through non-negotiated standard end-user agreements. I look at these two questions sequentially.

A. The nature of exceptions to copyright infringement

The qualification of exceptions to copyright infringement as rights or as a mere defence has important legal ramifications for consumers. Based on Wesley Hohfeld's theory of jural correlatives,³⁵⁶ lawful consumers have a legal claim against copyright holders to exercise exceptions to copyright infringement³⁵⁷ if they are rights,³⁵⁸ but not if they are mere defences to copyright infringement.³⁵⁹ This is particularly relevant when TPMs restrict the exercise of an otherwise permitted act.³⁶⁰ The right does not grant access to the work. It presupposes a lawful access. By contrast, an exception to copyright infringement that is not a right even if mandatory will, in Hohfeldian terms, be a privilege, albeit a strong one as any attempt by copyright holders to set it aside is not enforceable.³⁶¹ It is a privilege to the extent that it does not impose any duty on copyright holders, such as to facilitate the performance of a permitted act. At the same time, it leaves consumers free to make the permitted use as they please. A right that is not mandatory is

³⁵⁴ It is relevant to the nature of copies of copyright works discussed through property theory in the Second Part of my thesis and also in a consumer law analysis to copyright and copies of copyright work in the Third Part of my thesis.

³⁵⁵ See Part II B and D of this chapter.

³⁵⁶ I.e. that someone's right implies that someone has a duty towards it. A privilege is the ability to do something with no correlation from anyone obligated towards it (no right). For example, a defence to copyright infringement would qualify as a privilege to the extent that it allows a user to perform certain acts without authorization but does not require copyright holders to facilitate the exercise of these acts. See: Wesley N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1917) 26 Yale L.J. 710; Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1913) 23 Yale L.J. 16.

³⁵⁷ E.g., the right to make private copies or fair dealing.

³⁵⁸ Unless they are not mandatory and have been restricted by the copyright holder.

³⁵⁹ See the discussion further below in Part IV of this chapter on the French cases *Warner Music* and *Mullholland Drive*.

³⁶⁰ I discuss the nature and effects of TPMs in Part III B of this chapter.

³⁶¹ Hohfeld, *supra* note 356. On the distinction between mandatory exceptions and mandatory rights see Dusollier 2007, *supra* note 304 at 483-484.

necessarily weaker and becomes non-existent in non-negotiated standard end-user agreements to the extent that it is subject to contract terms that negate it.³⁶²

While the Supreme Court of Canada stated unanimously in *CCH* that exceptions to copyright infringement were users' rights, courts in France have held the contrary.³⁶³ The *UKCDPA*³⁶⁴ suggests that exceptions to copyright infringement are not rights.³⁶⁵ The view that exceptions to copyright infringement do not constitute rights in the sense that they implicate duties on the part of copyright holders is also shared by copyright scholars.³⁶⁶

The consequences of the distinction between rights and mere defences to copyright infringement are illustrated in the French case *Warner Music*.³⁶⁷ The Tribunal of first instance had ordered the rescission of the sale of CDs for digital music on the basis that the CD, which contained TPMs, could not be used on a specific kind of laptop. The CD contained a notification of the TPMs and stated that it could be read on most CD players and computers. The Tribunal held that this incompatibility with some computers constituted a latent defect under the French Code Civil.³⁶⁸ The Tribunal also ordered Warner Music France to remove TPMs from the CDs it distributed as TPMs prevented consumers from making private copies of the digital music. The Tribunal held that this annulled *de facto* the limit set by the legislator on the exclusive right of authors, which allowed individuals to make private copies.³⁶⁹ The Court of Appeal reversed the two orders of the

³⁶² For a discussion on the legal nature of exceptions to copyright infringement and on their mandatory nature see Dusollier 2007, *supra* note 304 at 477-511.

³⁶³ See the discussion below in Part IV A of this chapter on the French cases *Warner Music* and *Mulholland Drive*. See also: Séverine Dusollier, "Copie privée v. mesures techniques de protection: l'exception est-elle un droit ?" note sous Prés. Bruxelles (cess.), 25 mai (2004) 4 *Auteurs & Média*, 338, at 342-344 where the author argues in a Belgian context that exceptions to copyright infringement are not rights.

³⁶⁴ *Supra* note 27.

³⁶⁵ *Ibid*, s 28 (1) which states with respect to acts permitted in relation to copyright works: "The provisions of this Chapter specify acts which may be done in relation to copyright works notwithstanding the subsistence of copyright; *they relate only to the question of infringement of copyright* and do not affect any other right or obligation restricting the doing of any of the specified acts." (Emphasis added).

³⁶⁶ For a review of the literature and case law on the legal nature of exceptions to copyright infringement see Dusollier 2007, *supra* note 304 at 477-494, in particular at 481-485 regarding the arguments against qualifying exceptions to copyright infringements as rights. See also David Vaver, "Copyright Defenses as User Rights" (2013) Jo Pat Off Soc'y (forthcoming) at 14 who hesitates to qualify exceptions to copyright infringement as rights with correlative duties in Hohfeld terms, or that can be transferred, but acknowledging that they give rise to entitlements.

³⁶⁷ Trib. gr. inst. 5^e Paris, 10 January 2006, *Christophe R., UFC Que Choisir / Warner Music France, Fnac* (2006) JurisData: 2006-292685.

³⁶⁸ Art 1641 CcF.

³⁶⁹ As per art L 122-5, L 211-3 CPI.

Tribunal outlined above.³⁷⁰ It reversed the first order on the ground of deficient evidence of the existence of a latent defect.³⁷¹ It reversed the second order on the basis that the private copying exception to authors' rights was not a right but a defence.³⁷² Hence it could not be the basis for the initiation of a claim.³⁷³ The same approach was adopted by the French Court of Appeal and the Cour de Cassation in the *Mulholland Drive* case.³⁷⁴

The French Courts' qualification of private copying as a defence to copyright infringement contrasts sharply with the Supreme Court of Canada's characterization of exceptions to copyright infringement as "users' rights" in *CCH*.³⁷⁵ Yet, the scope of those "users' rights" is less certain than ever with the recent amendments to the *CCA*.³⁷⁶ Although there is nothing to suggest that the intent of those amendments to the *CCA* was to override *per se CCH*'s qualification of exceptions to copyright infringement as users' rights, at best it undermines their exercise significantly when copyright holders commercialize copies of copyright works with TPMs. The recent amendments to the *CCA* raise questions about the scope of users' rights that vary between the various permitted uses that the *CCA* confers to copyright users. I explore next the scope of exceptions to copyright infringement as they are currently set out in the *CCA* by distinguishing between those exceptions that are not subject to the non-circumvention of TPMs and those exceptions that are.

B. The scope of users' rights under the CCA

As I discussed above in this chapter, recent amendments to the *CCA* introduced the legal protection of TPMs.³⁷⁷ The amendments created various new infringements, including the circumvention of access-controls to copies of copyright works.³⁷⁸ No exception applies to acts of circumvention to perform acts that are specifically authorized by the *CCA*, such as fair dealing,

³⁷⁰ CA Paris, 20 June 2007, *Fnac Paris / UFC Que Choisir et autres*, (2007) Juris Data 2007-337236.

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ *Ibid.* Confirmed by the Cour de cassation, Cass, civ. 1ère, 27 November 2008, *UFC Que Choisir / Fnac, Warner music France* (2008) JurisData 2008-046005.

³⁷⁴ CA, Paris, 4 April 2007, *Studio Canal et al. v S. Perquin and Union fédérale des consommateurs Que choisir*, Gaz. Pal. 18/07/2007 N° 199, 23; confirmed by the Cour de Cassation: Cass civ 1st, 19 juin 2008 (2008) Bull civ, I, N° 177.

³⁷⁵ *Supra* note 5 at para 48.

³⁷⁶ *CCMA*, *supra* note 75.

³⁷⁷ See the discussion in Part III B of this chapter.

³⁷⁸ *CCA*, *supra* note 1, s 41.1(1) (a).

private copying, and the four newly introduced user provisions.³⁷⁹ By contrast, acts of circumvention of usage-control TPMs do not constitute a separate copyright infringement.³⁸⁰

The introduction of the legal protection of TPMs in the *CCA* raises additional areas of uncertainty regarding the scope of users' rights as described in *CCH*, at least when copyright holders distribute their works commercially with TPMs. Do the exceptions to copyright infringement or users' rights subsist in all cases when copyright holders make their copyright works available with TPMs or are they superseded by TPMs as they are now legally endorsed by the *CCA*? The following analysis does not apply to copies of copyright works that are made available without TPMs. I explore the scope of exceptions to copyright infringement as they are currently set out in the *CCA* by distinguishing between those exceptions that are not subjected to the non-circumvention of TPMs and those exceptions that are.

(i) Exceptions to copyright infringement not subject to the non-circumvention of technological protection measures (TPMs)

The legal status of fair dealing, the non-substantial part doctrine, the private copying regime, computer program exceptions, exhaustion or first sale doctrine, and the newly introduced non-commercial user-generated content rights are affected peripherally by the introduction of the legal protection of TPMs in the *CCA*.³⁸¹ On the one hand, consumers who circumvent access-control technologies and then perform an act that is a users' right, such as a fair dealing with the work, would be liable for the separate infringement of circumventing access-control technologies regardless of their subsequent lawful use of the copyright work.³⁸² This infringement would have no bearing on the legality of the fair dealing, private copying, non-substantial part, exercise of computer program exception, exhaustion, first sale doctrine, or non-commercial user-generated content, which would be assessed on their own merits. On the other hand, consumers are not

³⁷⁹ As discussed in Part IV D of this chapter.

³⁸⁰ *CCA*, *supra* note 1, s 41.1 (1) (a). See also *DMCA*, *supra* note 310, § 1201.

³⁸¹ *CCA*, *supra* note 1, ss. 41 to 41.21.

³⁸² *CCA*, *supra* note 1, s 41.1(1) (a).

forbidden to circumvent user-control technologies to perform those users' rights.³⁸³ In other words, consumers are not infringing copyright holders' rights if they circumvent usage-control technologies if their use of the copyright work is otherwise lawful, including if their dealing of the work is fair, or if they wish to exercise the newly introduced non-commercial user-generated content right.

I have argued above in this chapter that the new infringement of access-controls, but not of usage-controls, was an imperfect attempt to preserve the balance between encouraging the creation of works and their dissemination and lawful uses (i.e., the exercise of users' rights or copyright exceptions to copyright infringement).³⁸⁴ In particular, the *CCA* does not explicitly impose a positive obligation on copyright holders who apply usage-control TPMs to accommodate users' requests to make specific lawful uses. It only allows users to circumvent usage-controls.³⁸⁵

The introduction of the legal protection of TPMs makes the nature of users' rights as characterized in *CCH* even more unclear than it was before. Assuming for the intents of our discussion that the Supreme Court judgment imposes positive obligations on copyright holders to allow the permissible uses (as per the Hohfeldian model of jural correlatives of rights and duties), the introduction of the legal protection of TPMs adds a new layer of complexity. One interpretation is that TPMs effectively allow copyright holders who apply usage-control TPMs to override users' rights (in the sense of imposing obligations on copyright holders to allow permitted acts) and convert them to exceptions to copyright infringement. In essence, this amounts to a "halfway house" overriding effect. Another interpretation is that they leave users' rights as characterized by *CCH* (and as understood in Hohfeldian terms) more or less intact. While they confer more protection on copyright holders by creating additional hurdles against would-be unlawful users, they still require copyright holders to facilitate permitted uses by lawful users at their request. Even if the second interpretation on the effect of the TPMs introduced in the *CCA* preserves the effects of *CCH* better than the first interpretation, this illustrates how these provisions weaken users' rights. The provisions do so by imposing an additional hurdle for consumers (who do not have the ability to circumvent the usage-controls) to ask permission when

³⁸³ *Ibid.* the circumvention act is an infringement only if it relates to access-control TPMs, not usage-control ones.

³⁸⁴ See the discussion in Part III B of this chapter.

³⁸⁵ *Ibid.*

the essence of their right is that they do not need copyright holders' authorization in the first place, let alone the disincentive to exercise those rights and the additional legal uncertainty that the newly introduced legal protection of TPMs creates around the existence and scope of such users' rights.³⁸⁶ This is unprecedented in Canadian copyright law.

(ii) Exceptions to copyright infringement subject to the non-circumvention of technological protection measures (TPMs)

The newly introduced legal protection of TPMs have more drastic effects on the scope of the users' rights examined here than the ones I analyzed earlier,³⁸⁷ for copyright works that are made commercially available with TPMs. In that case, the *CCA* makes the existence of those rights explicitly subject to not circumventing access-control and usage-control technologies.³⁸⁸ Consumers and other users can, without the authorization of copyright holders, perform reproduction for private purposes, fix signals, record programs for later listening or viewing, and create backup copies *subject to* not circumventing access-control or usage-control technologies that restrict them from doing so.³⁸⁹ If they do, the acts they perform no longer fall under these user rights provisions and can infringe copyright, unless they are authorized under other provisions of the *CCA*.³⁹⁰ They may also be liable for the separate act of infringement for the circumvention of access-control technologies.³⁹¹

Through the effect of TPMs on the user rights examined in the present section, the *CCA* effectively creates a hierarchy of users' rights: unlike the users' rights examined earlier,³⁹² the newly introduced reproduction for private purposes, fixing signals, recording programs for later listening or viewing, and backup copies users' rights are "default rights" that exist subject to

³⁸⁶ Hargreaves, *supra* note 60 at 51 who discusses the detrimental effects that contract terms that restrict users' rights have on legal certainty about the very existence of those rights which makes him conclude that users' rights should be made mandatory.

³⁸⁷ I.e., fair dealing, the non-substantial part doctrine, the private copying regime, computer program exceptions, exhaustion or first sale doctrine and the newly introduced non-commercial user-generated content rights as discussed in Part II of this chapter.

³⁸⁸ *CCA*, *supra* note 1, ss 29.22 (1) (c), 29.23 (1) (b), 29.24 (1) (c).

³⁸⁹ *Ibid.*

³⁹⁰ Such as under the fair dealing provisions of the *CCA*, *supra* note 1, ss 29 to 29.2.

³⁹¹ *CCA*, *supra* note 1, s 41.1(1) (a).

³⁹² E.g., fair dealing, the non-substantial part doctrine, the private copying regime, computer program exceptions, exhaustion or first sale doctrine and the newly introduced non-commercial user-generated content rights examined earlier in Part IV B (i) of this chapter.

existing copyright holders' access-control or usage-control TPMs. The *CCA* explicitly allows copyright holders to override these rights through the use of TPMs. That is, even after consumers gain lawful access to the copyright work, the copyright holder can forbid consumers from circumventing usage-control technologies and exercising their right. This leads to another important question on the interaction between the *CCA* and contracts: are copyright exceptions or users' rights mandatory? Should a difference be made between negotiated and non-negotiated contracts?

C. Are exceptions to copyright infringement mandatory?

The mandatory nature of exceptions to copyright holders' exclusive rights is an unsettled area of the law. There is a revived interest in this question among copyright scholars, especially with the recent introduction of the legal protection of TPMs worldwide.³⁹³ The absence of explicit reference to the mandatory nature of exceptions to copyright infringement, as is the case in some jurisdictions,³⁹⁴ gives rise to diverging opinions.³⁹⁵ Determining the mandatory nature of exceptions to copyright infringement involves an investigation into the justifications that withstand each exception to copyright infringement, copyright law, and other laws and legal doctrines, including contract, consumer law, and constitutional law, and how they may constrain copyright holders' ability to override exceptions to copyright infringement in specific instances.³⁹⁶ While Lucie Guibault comes to no definitive conclusion in her book devoted to the mandatory nature of exceptions to copyright infringement,³⁹⁷ De Werra takes the position that exceptions to

³⁹³I discuss TPMs in Part III B of this chapter. An entire book examines the question of the mandatory nature of limitations to copyright holders' exclusive rights: see Guibault, *supra* note 279; see also De Werra, *supra* note 271; Dusollier 2007, *supra* note 304 at 495-511; Derclaye, *supra* note 280; Kretschmer, Derclaye, Favale & Watt, *supra* note 280.

³⁹⁴For example, this is the case of Belgium under which most limitations of copyright are mandatory with an exception in the case of on-demand services: *Loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins*, online : <http://www.sacd.be/Legislation-belge-du-droit-d?lang=fr>, art. 23bis. See also *Directive 2009/24/EC*, *supra* note 223, where some exceptions to copyright infringement related to computer programs cannot be limited by contract: art 5 (2) and (3).

³⁹⁵See Guibault, *supra* note 279 at 214-240, 263-277; 291, 296-302: based on her analysis of EU and US copyright and other laws, she concluded that there is no definite mean to determine whether limitations to copyright are mandatory or not, unless the relevant copyright laws state explicitly so. De Werra, *supra* note 271 at 336-336 takes the position in a European context, that copyright limitations that are grounded in fundamental rights (e.g. freedom of expression) cannot be overridden by contract but that most other limitations can.

³⁹⁶See the discussion in Part III A of this chapter.

³⁹⁷Guibault, *supra* note 279.

copyright infringement that are justified by fundamental rights cannot be overridden by contract, while the ones that are justified on other grounds, e.g., public policy considerations can.³⁹⁸ The same reasoning applies to exceptions to copyright infringement that are justified by market failures, i.e., they can be overridden by contract to the extent that the market failure disappears with new technologies.³⁹⁹ The debate about what are the proper justifications of exceptions to copyright infringement adds on to the complex multilayered application of different laws to determine the extent to which exceptions to copyright infringement are mandatory.⁴⁰⁰ In a nutshell, there is no definitive answer to whether exceptions to copyright infringement are mandatory, although commentators seem to be slightly more inclined to conclude that most if not all exceptions to copyright infringement are not mandatory and can be overridden by contract.

The mandatory nature of exceptions to copyright infringement is as much a determining factor for consumers as is the issue of whether exceptions to copyright infringement are rights or defences to copyright infringement.⁴⁰¹ While users' rights are in theory stronger than exceptions to copyright infringement,⁴⁰² they are significantly weakened if they are not mandatory, especially with respect to consumer transactions subject to non-negotiated standard end-user agreements. A mandatory exception makes a contract term to the contrary unenforceable, while a non-mandatory user right can be the basis of a legal claim only to the extent that it has not been overridden by enforceable contract terms.⁴⁰³

³⁹⁸ De Werra, *supra* note 271 at 335-336. See also Dusollier 2007, *supra* note 304 at 507-509.

³⁹⁹ De Werra, *supra* note 271 at 336-337.

⁴⁰⁰ See the discussion on the various theoretical justifications of copy ownership and users' rights in Chapter 6 Part III. See also De Werra, *supra* note 271 at 333-335 on the debate on the theoretical justifications that withstand the right to make private copies, i.e. the extent to which it is based on the right to privacy.

⁴⁰¹ See the discussion in Part IV A of this chapter on the nature of copyright limitations and the distinction between rights (which presuppose a correlative duty or obligation, v. a defence, exception or privilege which does not presuppose such duty or obligation but allows one to perform an act.

⁴⁰² *Ibid.*

⁴⁰³ The significance of the mandatory nature of exceptions to copyright infringement is illustrated by the French case Studio Canal where the Court of Appeal had ruled that the private copying was an exception to copyright infringement (not a right) but that it was nonetheless mandatory; any attempts by Studio Canal to limit its exercise was non enforceable. The Cour de cassation, (Cass civ. 1st, 28 February 2006, (2006) Bull civ 05-15.824) overturned the Court of Appeal judgment (CA Paris, 22 April 2005 (2005) JurisData 2005-268600) which had forbidden Les Films Alain Sarde and Studio Canal to apply TPMs that were incompatible with private copying as an exception to copyright infringement, and held that the private copying exception was not mandatory.

There is no explicit reference to the mandatory nature of the users' rights conferred by the *CCA*. The inquiry into whether they are mandatory requires a different analysis of two distinct categories of users' rights. In the first category of the users' rights examined above, i.e., fair dealing, non-substantial part, private copying regime, and non-commercial user-generated content rights, there is a reasonable (but not conclusive) argument to be made that those rights cannot be set aside by copyright holders through non-negotiated standard form contracts. The characterization by the Supreme Court of Canada in *CCH* of the exception to copyright holders' exclusive rights as being users' rights, and not mere loop holes in the *CCA*, supports that view.⁴⁰⁴ Whether such provisions can be set aside upon mutually agreed terms in a negotiated agreement is a separate issue that is beyond the scope of non-negotiated standard terms that prevail in consumer transactions.⁴⁰⁵ The Supreme Court could have referred to exceptions to copyright holders' exclusive rights,⁴⁰⁶ but instead it explicitly referred to them as "rights." To allow copyright holders to unilaterally discard the application of these provisions would empty the word "right," as used by the Supreme Court, of its substance.

The interaction of these users' rights with the legal protection of TPMs introduced in the *CCA* also suggests that there is recognition of the special status for these rights. While their exercise may be impaired by the presence of TPMs, the existence of these users' rights is not subject to the respect of TPMs. It is true that the *CCA* does not specifically require copyright holders to "lift" their usage-control technologies to allow consumers and other users to perform those acts that are usually permitted without the authorization of copyright holders. At the same time, consumers are allowed to circumvent usage-control technologies without infringing copyright by doing so.⁴⁰⁷

⁴⁰⁴ *CCH*, *supra* note 5 at para 48.

⁴⁰⁵ The public policy aspects and balancing act between competing interests that these provisions embed could support the argument that these provisions are mandatory and that clauses that would seek to limit them, even if mutually agreed to would be of no force and effect. See Guibault, *supra* note 279 at 220. In the case of the private copying regime of the *CCA*, *supra* note 1, copyright holders who are compensated under the scope defined by the private copying regime cannot at the same time restrict copying contrary to that regime, while being compensated. In that case, the application of the private copying regime clauses are of a mandatory nature with respect to such copyright holders.

⁴⁰⁶ The title preceding *CCA*, *supra* note 1 ss 29ff, refers to "Exceptions." Exceptions or defences to copyright infringement is how these limitations of copyright holders exclusive rights are commonly referred to: see *Berne Convention for the Protection of Literary and Artistic Works*, 828 U.N.T.S. 221, September 9, 1886; rev. in Berlin November 13, 1908, art. 11, 13, 14; rev. in Rome June 2, 1928, art. 11bis [*Berne Convention*] at art 9; The *WCT*, *supra* note 227, art 10 and the *WPPT*, *supra* note 227, art 16, also refer to "exceptions" and "limitations" of the exclusive rights of copyright holders.

⁴⁰⁷ See the discussion in Part IV B (i) of this chapter.

These “accommodations” between the legal protection of TPMs and users’ rights, albeit imperfect, signal Parliament’s intent to make room for the exercise of users’ rights. As I discussed above, at worst the interaction between the TPMs and the users’ rights in question⁴⁰⁸ converts them *de facto* into mandatory exceptions to copyright infringement.

The strong public policy underpinnings that withstand the fair dealing and the non-commercial user-generated content provisions in incentivizing the creation of new works and the automatic levy that is built into the private copying regime could support the argument that these exceptions to copyright infringement cannot be overridden at the will of copyright holders. The mandatory nature of these users’ rights, at least with respect to non-negotiated standard end-user agreements, would be more consistent with the *CCA*’s objectives to preserve a balance between competing interests.⁴⁰⁹

The mandatory nature of the second category of the other users’ rights examined above⁴¹⁰ is less probable although there is no clear answer to that question either. As I discussed above, the *CCA* explicitly subjects the existence of those rights to the non-circumvention of access-control and usage-control TPMs.⁴¹¹ The second category of users’ rights examined here being explicitly subject to TPMs effectively allows copyright holders to override these rights when they commercialize their works with TPMs. By virtue of an interpretation by extension, copyright holders could also override these users’ rights by restrictive contract terms because Parliament already signalled the non-obligatory nature of these users’ rights. In a more restrictive interpretation, these users’ rights can only be restricted by TPMs: if Parliament intended that they could be restricted, it would explicitly have stated so.

To sum up on the nature of users’ rights or exceptions to copyright infringement, in Canada, while the nature of exceptions to copyright holders’ exclusive rights has been characterized as “rights” by *CCH*, their scope remains uncertain, even more so with the recent amendments to the *CCA* that

⁴⁰⁸ *I.e.* the users’ rights examined in Part IV B (i) of this chapter: fair dealing, non-substantial part, private copying regime and non-commercial user-generated content.

⁴⁰⁹ *Théberge*, *supra* note 16 at para 30; *CCMA*, *supra* note 75, Preamble, 6th paragraph. See the discussion on the *CCA*’s objective to maintain a balance between competing interests in Chapter 2 Part II.

⁴¹⁰ *I.e.*, the newly introduced reproduction for private purposes, fixing signals and recording programs for later listening or viewing and backup copies users’ rights: see the discussion in Part IV B (ii) of this chapter.

⁴¹¹ See the discussion in Part II D (ii) to (iv).

introduced the legal protection of TPMs. As I argued above, the legal protection of TPMs effectively institutes a hierarchy of users' rights. The mandatory nature of those rights is also uncertain, but it is reasonable to argue that they are mandatory in some cases, at least with respect to one of the two categories of users' rights explored here and when the contract that interferes with those rights is a non-negotiated standard end-user agreement.⁴¹²

The closer examination of the nature, scope, and mandatory nature of copyright users' rights in Canada reveals an overly complex web of interactions between the *CCA*, TPMs, and contracts that undermines the very existence of users' rights as we have come to describe exceptions to copyright infringement in Canada since *CCH*.⁴¹³ The less than certain nature of copyright users' rights in the *CCA* is a somewhat desolate situation in light of the recent wave of Supreme Court jurisprudence that displays a greater attentiveness to interests competing with the exclusive rights of copyright holders, including the interests of users and the public.⁴¹⁴ The unclear nature of users' rights brought on by the loose ends of their interactions with TPMs and consumer contracts provides a less cheerful perspective on the recent major amendments to the *CCA* that give place more than ever before to individual users and consumers.⁴¹⁵

The constraints that are permitted or not disallowed on users' rights in the *CCA*, leading to questions about their true nature and scope, are not mere academic questions. In addition to leaving consumers in an undesirable state of legal uncertainty and exposing them to increased risk of litigation,⁴¹⁶ the permitted constraints on their rights dictate to a large extent how copyright holders and intermediaries develop their business models and their offerings to consumers.⁴¹⁷ The unsettled nature of exceptions to copyright infringement, or the so-called users' rights, has

⁴¹² E.g. under the fair dealing, the non-substantial part doctrine, the private copying regime, computer program exceptions, exhaustion or first sale doctrine and the newly introduced non-commercial user-generated content rights, as they are discussed in Part II and in Part IV B (i) and C of this chapter.

⁴¹³ *Supra* note 5.

⁴¹⁴ See the discussion on the *CCA*, *supra* note 1 objective to preserve a balance between competing interests in Chapter 2 Part II and the discussion on recent developments on fair dealing in Part II C of this chapter.

⁴¹⁵ See the discussion in Chapter 2 Part V and in Part II C and D of this chapter.

⁴¹⁶ See Hargreaves, *supra* note 60 at 51. See also my discussion in Chapter 1 Part I and II about claims of copyright infringement brought directly against consumers and on the regulatory trend towards the expansion of enforcement tools and remedies. See also the discussion on the progressive expansion of copyright in Chapter 5 Part II.

⁴¹⁷ On a related idea, see Liu, "Enabling Copyright Consumers", *supra* note 155, where the author describes how clearer affirmation of users' rights would support the lawfulness of copyright content intermediaries' act which in turn enable and offer greater support to copyright consumers'.

rippling effects on the scope of copyright consumers rights to commercial copies of copyright works as a whole. As an important legal basis to delineate copyright consumers' rights, the CCA's uncertain rendering of users' rights can also have a rippling effect on the effective support that property and consumer law offers with respect to copyright consumers' claims to commercial copies of copyright works. I explore these two themes in the Second Part and in the Third Part of my thesis. Before that, the current status of copyright users' rights in Canada and elsewhere needs to be understood in the context of Canada's international copyright obligations, to which I will now turn.

V. Canada's international copyright obligations

The overview of acts that copyright consumers can perform on lawfully acquired copies would be incomplete without contextualizing them within the international conventions to which Canada is a party: the *Berne Convention for the Protection of Literary and Artistic Works* [*Berne Convention*],⁴¹⁸ the *North American Free Trade Agreement* [NAFTA],⁴¹⁹ the *Agreement on the Trade Related Aspects of Intellectual Property Law* [TRIPS].⁴²⁰ With the entry into force of the CCMA in 2012, Canada's ratification of the *WIPO Internet Treaties*⁴²¹ is imminent.⁴²²

International intellectual property conventions have shaped and will likely continue to shape Canadian copyright law to a large extent.⁴²³ Their harmonization objectives for the protection of

⁴¹⁸ *Supra* note 406, art 9(2).

⁴¹⁹ *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America* (1992), Can T.S. 1994 No. 2 (entered into force January 1, 1994), section 1705(5).

⁴²⁰ *Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C*, Apr. 15, 1994, 1869 U.N.T.S. 29, 33 I.L.M. 1197 (1994) [TRIPS], art 13.

⁴²¹ I.e., the *WCT*, *supra* note 227 and the *WPPT*, *supra* note 227.

⁴²² CCMA, *supra* note 75, Preamble, refers to Canada's need to align to copyright norms recognized internationally as reflected in the *WIPO Internet treaties*; Canada is a signatory to the *WIPO Internet Treaties*, *supra* note 227, since 1997 but as of April 1, 2013 there was no record on the WIPO registry of member states that Canada had ratified the *WIPO Internet Treaties*: WIPO official website: <http://www.wipo.int/treaties/en/ip/wct/>.

⁴²³ For example: the following acts amended the CCA, *supra* note 1, in order to comply with Canada's international copyright obligations: *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65; *World Trade Organization Agreement Implementation Act*, S.C. 1994 c. 47, to ensure *inter alia* Canada's compliance with its international obligations under TRIPS, *supra* note 420, and more recently, the CCMA, *supra* note 75, to ensure Canada's compliance with the *WIPO Internet Treaties*, *supra* note 227.

intellectual property, together with their high level of state membership (among which, Canada's main international trading partners), create internal and external political pressures for Canada to harmonize its laws with the international norms that are embedded in the international conventions.⁴²⁴ The debates leading up to, and the recent entry into force of the *CCMA* illustrate that phenomenon.⁴²⁵ Whether the justifications for invoking international conventions to change copyright law are always founded upon genuine international legal obligations rather than political grounds is sometimes debatable, as commentators have argued amidst the recent waves of Canadian copyright legislative reform initiatives.⁴²⁶

With the *Berne Convention* in the lead (together with the *WIPO Internet Treaties*, as special agreements to the *Berne Convention*)⁴²⁷ intellectual property international conventions' primary purposes are to promote, protect, and enforce right holders' exclusive rights.⁴²⁸ In order to achieve

See also the discussion in Chapter 5 Part II on the progressive expansion of copyright in Canada including through Canada's membership to international copyright and intellectual property conventions.

⁴²⁴ The US has placed Canada on its special watch list of countries which allegedly do not enforce intellectual property rights (including copyright) adequately since 1995. The Embassy of the US in Canada summarizes the situation as follows: "Canada's relatively weak protection and enforcement of intellectual property rights (copyrights, trademarks, patents, and trade secrets) has attracted domestic and international attention. Since 1995, the United States Trade Representative (USTR) has placed Canada on the U.S. Government's Special 301 "Watch List", which designates U.S. trading partners that have particular problems with respect to IPR protection." : Embassy of the United States, Ottawa, Canada, Special 301 Report (Intellectual Property Rights), online: <http://canada.usembassy.gov/key-reports/special-301-report-intellectual-property-rights.html>. Under US laws, economic sanctions can be imposed against countries that are on that list. The manner by which international forums leading to international conventions are utilized by national governments and non governmental organizations to advance their interests nationally and internationally is discussed in Laurence Helfer, "Regime Shifting: The Trips Agreement And New Dynamics Of International Intellectual Property Lawmaking" (2004) 29 Yale J. Int'l L. 1.

⁴²⁵ In particular, arguments on the manner by which the *CCA*, *supra* note 1 needed to be amended for Canada to comply with its international obligations to implement effective TPMs under the *WIPO Internet Treaties*, *supra* note 227, have been the object of heated debate. See for example: Geist, *supra* note 300, and in direct response to this article: Ficsor, *supra* note 300. See also *CCMA*, *supra* note 75, Preamble, which specifically refers to the need for Canada to coordinate its approach with other countries through the adoption of internationally recognized copyright norms and to amend the *CCA*, *supra* note 1, to comply with the *WIPO Internet Treaties*, *supra* note 227.

⁴²⁶ *Ibid.*

⁴²⁷ The *WIPO Internet Treaties*, *supra* note 227, are special agreements to the *Berne Convention*, *supra* note 406, art 20. Special agreements need to grant to copyright holders more protection than under the *Berne Convention* or at least contain provisions that are not contrary to the *Berne Convention*.

⁴²⁸ *Berne Convention*, *supra* note 406, art 1 provides for the creation of a Union "for the protection of the rights of authors in their literary and artistic works."; *TRIPS*, *supra* note 420, Preamble; *WCT*, *supra* note 227, Preamble, *WPPT*, *supra* note 227, Preamble.

these goals, the international conventions set substantive minima,⁴²⁹ including the subject matter, scope of copyright protection, and enforcement that member states need to provide to other member states' nationals. The conventions generally operate under the principle of national treatment by virtue of which member states cannot offer a lower level of copyright protection than the one they offer to their own nationals.⁴³⁰ Member states are free to offer greater levels of copyright protection and enforcement than are required under the international conventions.⁴³¹ These international conventions do not set substantive maxima on copyright holders' rights except in very rare instances.⁴³² The voices that are expressing the need for the clearer elaboration of limitations and exceptions to copyright infringement in international instruments are increasingly receiving attention.⁴³³

Of particular relevance to copyright consumers' rights, these international conventions also establish the conditions under which member states may limit copyright holders' exclusive

⁴²⁹ The principle of substantive minima or minimum standard is stated as follows in TRIPS, *supra* note 420, art 1 (1): "Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."

⁴³⁰ TRIPS, *supra* note 420, art 3 (1) imposes a national treatment obligation to the member states, with some exceptions including as they are already stated in the Paris Convention (1967) the Berne Convention (1971) and the Rome Convention: *ibid*.

⁴³¹ This flows from the principle of minimum standards or substantive minima.

⁴³² One limitation to copyright holders' exclusive rights is mandatory in the *Berne Convention*, *supra* note 406, i.e. art 10(1) which deals with the right to "make quotations from a work which has already been lawfully made available to the public": *ibid*. As Vaver, "From Owner Rights to User Rights", *supra* note 298 at 736 observes, referring to the three-step test (see discussion in this section, *infra*) that applies to any exception to copyright infringement: "If user rights were truly to be balanced against owner rights, one would expect to find a provision that owner rights should be enacted or enforced only in (1) certain special cases that (2) demonstrably encourage the production of the work, and that (3) do not unreasonably prejudice the legitimate interests of users. That feature of balance does not yet appear on any WIPO or TRIPS agenda. It should." For a response to critiques of the lack of a substantive balance at the international copyright level and the need to look at the distinct nature of international conventions and flexibility that they confer to national member states, see: Graeme Dinwoodie, "The International Intellectual Property System: Treaties, Norms, National Courts and Private Ordering" in D. Gervais (ed.) *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era* (Oxford: Oxford University Press, 2007) 61 at 88-89.

⁴³³ See P.Bernt Hugenholtz and Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, sponsored by Open Society Institute (OSI), Final Report (6 March 2008). See also Dinwoodie, *supra* note 432 at 87, where the author discusses movements at the international level to develop positive users' rights.

rights.⁴³⁴ The *Berne Convention*, *TRIPS*, and *WIPO Internet Treaties* each contain a provision commonly referred to as the “three-step test” that sets the conditions that need to be met when member states impose restrictions on or exceptions to copyright holders’ exclusive rights.⁴³⁵ The three-step test provides that member states shall confine limitations or exceptions to copyright holders’ exclusive rights to: (i) special cases, (ii) which do not conflict with a normal exploitation of the work, and which (iii) do not unreasonably prejudice the legitimate interests of copyright holders.⁴³⁶

In theory, the three-step test establishes a framework for how national member states should address exceptions to copyright infringement in their laws. In practice, it is questionable that the broad and vague wording of the three-step test can provide much guidance to national legislatures.⁴³⁷ The interpretations of the three-step test vary widely, from a balanced interpretation granting flexibility to implementation by national jurisdictions,⁴³⁸ to interpretations narrowly construing the permitted exceptions to copyrights.⁴³⁹ This is generally the trend in the jurisprudence on *TRIPS* that emanates from the World Trade Organization Dispute Settlement

⁴³⁴ Ricketson & Ginsburg, *supra* note 230 at 755-878, analyse the exceptions to copyright holders’ exclusive rights under the *Berne Convention*, *supra* note 406, *TRIPS*, *supra* note 420 and the *WIPO Internet treaties*, *supra* note 227.

⁴³⁵ *Berne Convention*, *supra* note 406, art 9(2); *TRIPS*, *supra* note 420, art 13; *WCT*, *supra* note 227, art 10; *WPPT*, *supra* note 227, art 16. The three-step test is limited to reproduction rights in the case of the *Berne Convention*, *ibid*, and applies to all exclusive rights in the case of *TRIPS*, *WCT* and *WPPT*, *ibid*.

⁴³⁶ *Ibid*. The language varies between the three conventions but the substance of each of the three requirements is similar, except for the *Berne Convention*, *supra* note 406, art 9(2) which applies only to the exclusive reproduction rights of copyright holders.

⁴³⁷ Unlike other international intellectual property norms. For example, the obligation pursuant to *TRIPS*, *supra* note 420, to protect computer programs as literary works, or the obligation to secure exclusive rental rights on computer programs and optionally, on cinematographic works (*Ibid*, arts 10-11). See Giuseppina D’Agostino, “Opening Remarks to the Legislative Committee on Bill C-32” made on December 1, 2010, online: <http://www.iposgoode.ca/2010/12/my-opening-remarks-to-the-legislative-committee-on-bill-c-32/>, [D’Agostino, “Opening Remarks to the Legislative Committee”] arguing against the incorporation of the three-step test in the *CCA*, *supra* note 1: “This would be inviting more ambiguity to an already ambiguous framework in defining, for Canada, what is meant by normal exploitation, what is unreasonable prejudice, what are the legitimate interests of the author and so on.”

⁴³⁸ Government of Canada, *Balanced Copyright, Copyright Modernization Act — Background*, *supra* note 180. See also For example see: Christopher Geiger, “The three-step test, a threat to a balanced copyright law” (2006) 37 *International Review for Intellectual Property and Competition Law*, 683 [Geiger 2006]; Andrew F. Christie, “Maximising Permissible Exceptions to Intellectual Property Rights” in Annette Kur & Vytautas Mizaras, eds, *The Structure of Intellectual Property Law: Can One Size Fit All?* (Cheltenham, UK: Edward Elgar, 2011) 121.

⁴³⁹ See *infra* note 440. The application of the three-step test to copyright has been largely commented upon, including in Canada. See for example: Daniel Gervais, “Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations” (2008) 5 *University of Ottawa Law & Technology Journal* 1.

Body.⁴⁴⁰ Although the reports issued by the panels set up by this body only bind the parties to the dispute, they are often referred to as authoritative sources on the interpretation of *TRIPS* and other international agreements.

One corollary of the vague language of the three-step test is that this should give member states the flexibility they need to create the proper level of exceptions and limitations to copyrights to meet the needs of their specific domestic exigencies. This is what a group of international copyright scholars advocated through *The Declaration – A balanced interpretation of the three-step test in copyright Law* that was signed in 2008.⁴⁴¹ This initiative falls within broader movements that press the need to give way to the flexibilities that international intellectual property conventions such as *TRIPS* contain so as to allow member states to adequately balance a broad range of competing interests with those of exclusive right holders.⁴⁴²

⁴⁴⁰ The Three-step test has been applied by the Panels constituted by the World Trade Intellectual Property Dispute Settlement Body with respect to various intellectual property rights. With respect to *TRIPS*, *supra* note 420, art 13 (three-step test for copyright) see: *United States- Section 110(5) Copyright Act* (Complaint by the European Communities) (2000) WTO Doc WT/DS160/R, at 31-68 (Panel Report). See also on the interpretation of *TRIPS*, *supra* note 420, art 30 (three-step test regarding patents): *Canada-Patent protection of pharmaceutical products (Complaint by the European Communities)* (2000) WTO Doc WT/DS114/R, at paras 7.20ff (Panel Report); The panel reports are not binding except as between the parties to the dispute. They are frequently referred to as authoritative sources of interpretation of *TRIPS*, *supra* note 420, and other international conventions. For a review of the interpretations of the tests applied in Panel reports, see: Graeme B. Dinwoodie & Rochelle C. Dreyfuss, “Designing a Global Intellectual Property System Responsive to Change: the WTO, WIPO, and Beyond” (2009) 46 Hous. L. Rev. 1187 at 1206ff.

⁴⁴¹ *Declaration (2008) A balanced interpretation of the three-step test in copyright* (from the Max Planck Institute), Online: <http://www.ip-watch.org/2008/07/24/ip-experts-sign-declaration-against-unbalanced-copyright-three-step-test/>. The initiators and coordinators of the Declaration are: Christophe Geiger, Reto M. Hilty, Jonathan Griffiths & Uma Suthersanen. The group of experts contributing to the drafting of the Declaration and first signatories are: Valérie Laure Benabou, Lionel Bently, Thomas Dreier, Séverine Dusollier, Gustavo Ghidini, Henning Große Ruse-Khan, Bernt Hugenholtz, Dionysia Kallinikou, Kamiel Koelman, Annette Kur, Makeen Makeen, Vytautas Mizaras, Hector MacQueen, Gül Okutan Nilsson, Alexander Peukert, Jerome Reichman, Jan Rosen, Jens Schovsbo, Martin Senftleben, Fabrice Siirainen, Paul L.C. Torremans, Elzbieta Traple, Michel Vivant, Rolf Weber, Guido Westkamp & Raquel Xalabarder.

⁴⁴² The international movement towards an interpretation of *TRIPS*, *supra* note 420 that gives more flexibility to its member states has been prevalent in the area of patents and public health issues, as reflected in the Declaration on the *TRIPS* agreement and public health, Doha, 14 November 2001, WT/MIN(01)/DEC/2. See also: Christopher Geiger, “Exploring the Flexibilities of the *TRIPS* Agreement’s provisions on limitations and exceptions” in Annette Kur & Vytautas Mizaras, eds, *The Structure of Intellectual Property Law: Can One Size Fit All?* (Cheltenham, UK: Edward Elgar, 2011) 287.

The three-step test has been specifically incorporated in EU secondary law⁴⁴³ and in national copyright legislation, including in France.⁴⁴⁴ The inclusion of the three-step test in the *CCA* was proposed in the parliamentary hearings on *Bill C-32*,⁴⁴⁵ but the three-step test was not included in the amendments to the *CCA* in 2012.⁴⁴⁶ In light of the vague and broad language of the test, it is not surprising that such incorporation has been received with skepticism in the jurisdictions that have incorporated the three-step test in their regional or national laws. In particular, commentators fear that the manner by which the EU incorporated the three-step test in its secondary law gives a tool to the judiciary to further shape (i.e., generally constrain) existing copyright limitations or exceptions as they currently exist within their domestic laws, thus adding more legal uncertainty to existing legal concepts.⁴⁴⁷ Other commentators take the contrary position, viewing the incorporation of the three-step test into domestic laws more positively, and arguing that it can maximize the effect of the flexibilities that the test confers in the treatment of exceptions to copyrights.⁴⁴⁸

There is confusion about the effect of international conventions on domestic law and courts. In Canada and other jurisdictions, international conventions to which Canada is a party, are not the law *per se* in Canada. An enabling act of Parliament is needed, the intent of which being to give effect to the international convention through the application of the transformation doctrine.⁴⁴⁹ When the enabling act is in place, the international convention serves as an aid to interpret and contextualize the national law that gives effect to it (in the present instance, the *CCA*) to clarify

⁴⁴³ See *Directive 2001/29/EC*, *supra* note 237, art 5(5) imposes the three conditions as they are set in the three-step test to the scope of limitations or exceptions copyright holders' exclusive rights that European Member States may impose.

⁴⁴⁴ Art L122-5 CPI, *in fine*, submits limitations to copyright holders' exclusive rights to the three-step test.

⁴⁴⁵ *Bill C-32, An Act to amend the Copyright Act*, 3rd Session, 40th Parl., 2010 (1st reading June 2, 2010); See D'Agostino, "Opening Remarks to the Legislative Committee," *supra* note 437.

⁴⁴⁶ *CCA*, *supra* note 1, amended by the *CCMA*, *supra* note 75.

⁴⁴⁷ See Geiger 2006, *supra* note 438, Dusollier 2007, *supra* note 304 at 435-447; Dusollier 2010, *supra* note 246 at para 2.1.3. In the Canadian context see D'Agostino, "Opening Remarks to the Legislative Committee" *supra* note 437, arguing against the introduction of the three-step step in the *CCA*, *supra* note 1.

⁴⁴⁸ See for example Christie, *supra* note 438. On a related idea, see Daniel Gervais, "Towards a new core international copyright norm: the reverse three-step test" (2005) 9 Marq. Intell. Prop. L. Rev. 1.

⁴⁴⁹ See *Capital Cities Communications Inc. v Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 at 171-176. International conventions are negotiated and signed by the Government and as such do not create laws. The enabling act of Parliament must fall within Parliament's subject-matter powers.

any uncertainty.⁴⁵⁰ As the Supreme Court stated in *National Corn Growers Assn. v. Canada (Import Tribunal)*,⁴⁵¹ “where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations.”⁴⁵² International treaties provide a contextual interpretation tool for the Canadian enabling act.⁴⁵³

In Canada, there is little doubt that international intellectual property conventions influence court decisions. The manner by which they do is not always clear and consistent with the legal sphere in which international conventions operate vis-à-vis our domestic laws. International conventions are invoked by our courts in varied circumstances and legal bases. In some cases, including in cases involving copyright issues, the Supreme Court and lower courts have resorted to international conventions to give a historical interpretation of the *CCA* or to interpret the scope of its provisions when unclear.⁴⁵⁴ In other cases, courts have been silent on the existence of international norms deriving from intellectual property conventions to which Canada is a party. It is noteworthy that the Supreme Court did not refer to the three-step test in three recent judgments where it had to interpret the scope of fair dealing in Canada, i.e., *CCH*, *Bell Canada*, and *Alberta*.⁴⁵⁵ Canada needs to comply with the three-step test by virtue of its copyright international obligations.⁴⁵⁶ The compliance of fair dealing, as interpreted by the Supreme Court with the three-step test is unclear.⁴⁵⁷ Finally, Canadian courts have referred to international conventions to

⁴⁵⁰ *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, Part IV B) a) (Gonthier J. for the majority).

⁴⁵¹ *Ibid.*

⁴⁵² *Ibid.* See also *Re: Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38 at para 51.

⁴⁵³ Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at 422.

⁴⁵⁴ *Théberge*, *supra* note 16 at paras 6, 71, 114; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, *supra* note 38 at paras 16-20, 24, 87-97. *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, *supra* note 38 at paras 25, 36-43; *Re: Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38, at para 7.

⁴⁵⁵ In *Reprographic Reproduction 2005-2009, Re*, 2009 CarswellNat 1930 (Copyright Board), at para 114 the Copyright Board referred to the three-step test of the *Berne Convention*, *supra* note 406, art 9(2) and *TRIPS*, *supra* note 420, art 13, concluding that “copies made on a teacher's initiative for his or her students either conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the rights holders”.

⁴⁵⁶ As it is set out in the *Berne Convention*, *supra* note 406, art 9(2); *TRIPS*, *supra* note 420, art 13, and upon Canada's ratification of the *WIPO Internet Treaties*, in *WCT*, *supra* note 227, art 10 and *WPPT*, *supra* note 227, art 16.

⁴⁵⁷ The question includes whether the application of the analytical framework that the Supreme Court applied in *CCH*, *supra* note 5 and recently in *Bell Canada*, *supra* note 42 and *Alberta*, *supra* note 90, to assess whether the dealing in a work is fair, would meet the requirements of the three-step test. See Gervais, “Canadian Copyright Law Post-CCH” (2004) 18 I.P.J. 131 at 164ff.; Daniel Gervais, “The Purpose of

interpret domestic law, even if there is no enabling act of Parliament in place giving effect to the obligations of the international conventions.⁴⁵⁸ The Supreme Court referred to the *WIPO Internet Treaties* on occasion, even when Canada was only a signatory to these conventions and had not yet ratified and given effect to their provisions by amending its national laws.⁴⁵⁹

One of the overarching goals of international intellectual property conventions is the harmonization of national copyright laws worldwide to promote the global trade of intellectual property intensive products.⁴⁶⁰ The Supreme Court and lower courts have invoked international conventions to support an interpretation to harmonize Canada's laws to international norms and as a means to refer to the national laws of "like-minded jurisdictions."⁴⁶¹ The legislative reform debates that led to the entry into force of the *CCMA* in 2012 confirm that the harmonization of Canadian laws with copyright international law is part of Canada's policy objectives.⁴⁶²

Copyright Law in Canada" (2005) 2 U. Ottawa L. & Tech. J. 315, in particular at 322. On the compliance of the fair use doctrine with the three-step test in a US context, see Haochen Sun, "Overcoming the Achilles Heel of Copyright Law" (2007) 5 Nw. J. Tech. & Intell. Prop. 265.

⁴⁵⁸ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (SCC).

⁴⁵⁹ For example in *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, *supra* note 27, paras 65, 73, 97, 108, 149-151 the Supreme Court (both in reasons of majority and Lebel J. reasons) referred to *WCT*, *supra* note 227, art 8 (making available right) to interpret the *CCA*, *supra*, note 1, s. 2.4(1) (b): Communication to the public by telecommunication, at a time where Canada was only a signatory to *WCT*, *supra* note 227. See also *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, *supra* note 38 at paras 44-49 where the Supreme Court referred to *WCT*, *supra* note 227, art 8 in support of its interpretation of *CCA*, *supra* note 1, s 3(1)(f), noting that: "The WCT is only cited to demonstrate that the broad interpretation of s. 3(1)(f) of the Act, recognizing that a communication "to the public" subject to copyright protection may occur through point-to-point transmissions at the user's request, is not out of step with art 8 of the WCT and international thinking on the issue.": *ibid*, at par 49. For a discussion on how Canadian Courts refer to international conventions in intellectual property law, see Daniel J. Gervais, "The Role of International Treaties in the Interpretation of Canadian Intellectual Property Statutes" in Oonagh Fitzgerald, ed., *The Globalized Rule of Law: Relationships Between International and Domestic Law* (Toronto: Irwin Law, 2006) 549 [Gervais, "The Role of International Treaties"]; see also Mira J. Tawfik, "No Longer Living in Splendid Isolation: The Globalization of National Courts and the Internationalization of Intellectual Property Law" (2007) 32 Queen's L.J. 573.

⁴⁶⁰ See the discussion above in Part V of this chapter.

⁴⁶¹ *Théberge*, *supra* note 16 at para 6 where Binnie, J. for the majority observed: "In light of the globalization of the so-called "cultural industries", it is desirable, within the limits permitted by our own legislation, to harmonize our interpretation of copyright protection with other like-minded jurisdictions." See also Gervais, "The Role of International Treaties", *supra* note 459, in particular at 567-568, where the author describes the shift in the Supreme Court intellectual jurisprudence in how it invokes international intellectual property conventions beyond the classical rule of interpretation in case of uncertainty, but more to support broader policy arguments including trade-related justifications that withstand an instrumentalist view of intellectual property.

⁴⁶² *CCMA*, *supra* note 75, Preamble: "Whereas in the current digital era copyright protection is enhanced when countries adopt coordinated approaches, based on internationally recognized norms" and states that

International copyright conventions have shaped, and will likely continue to shape, the *CCA*, Canadian copyright policy, and court decisions to a large extent. Their political and normative force in the lead up to ongoing amendments of the *CCA* is undeniable. While Parliament is bound to incorporate the international norms they create when implementing new laws to give effect to them, their applicability before our courts is a different matter. They are not *the law* but can at times provide context to it when it is unclear. This distinction is particularly important in the context of the three-step test, which by its language is unlikely to be of much assistance to the judiciary when clarifying exceptions to copyright infringement. This may explain why the Supreme Court did not refer to the test on the three recent occasions when it had to interpret the scope of fair dealing.⁴⁶³

To sum up, any argument based on international conventions to which Canada is a member state needs to be approached with caution. While the influence of international copyright and intellectual property conventions on the evolution of Canadian copyright law is undeniable, international copyright conventions remain distinct from Canadian copyright law. International copyright and intellectual property conventions provide a source of interpretation of the *CCA* in specific cases. When referring to international conventions, either in the context of legal reform or as an aid to interpretation of the *CCA*, law- and policy-makers, as well as the judiciary, should bear in mind the flexibility that international copyright and intellectual property conventions generally confer on member states as to how they are implemented. The same rule of interpretation should guide reference to the three-step test as an international copyright norm regarding exceptions to copyright holders' exclusive rights.

VI. Conclusion

Copyright law has little regard for copyright consumers. Many of the permitted uses of copyright works without copyright holders' consent are not of particular relevance to consumers. Recent amendments to the *CCA*, adding education, parody, or satire to the purposes of fair dealing, and introducing the four new user provisions do not improve matters much for consumers. While the

one of the objectives of the *CCMA*, *ibid*, is to amend the *CCA*, *supra* note 1, in order to comply with international norms as they are reflected in the *WIPO Internet Treaties*, *supra* note 227.

⁴⁶³ I.e. in *CCH*, *supra* note 5; *Bell Canada*, *supra* note 42 and *Alberta*, *supra* note 90.

recent amendments to the fair dealing provisions and Supreme Court jurisprudence on fair dealing indicate a greater recognition of the interests (e.g., users, the public) competing with the exclusive rights of copyright holders, the fair dealing doctrine is ill adapted to address the needs of copyright consumers.⁴⁶⁴ With respect to the introduction of the four new user provisions, while they show an unprecedented attempt to address specific needs of copyright consumers, they are piecemeal and are subject to many caveats.⁴⁶⁵ In addition, the status of freedoms and privileges that have been traditionally considered outside the purview of the exclusive rights of copyright holders, i.e., the unlimited right to read, listen, and play copies of copyright works is threatened in the digital environment.⁴⁶⁶

The legal landscape of copyright consumers is a maze: the paths of users' rights include many dead ends. What Parliament created and gave to consumers, it also gave explicit allowance to copyright holders to take back from them, or turned its head away from copyright holders' ability to do so. Of the four new user provisions, three can be explicitly overridden by TPMs. This significantly compromises their status as rights and makes their mandatory nature unlikely. As to other exceptions to copyright infringement, their nature and scope as rights are debatable and so is their mandatory nature. With all these questions in mind, the so-called copyright users' rights, even when they apply, do not provide much solace to copyright consumers because of all the instances when they may not apply and the legal uncertainty that results therefrom.

The constraints that are permitted or not disallowed on users' rights in the *CCA*, leading to questions about their true nature and scope are not mere academic questions. In addition to leaving consumers in an undesirable state of legal uncertainty and exposing them to increased risk of litigation, the permitted constraints on users' rights dictate to a large extent how copyright holders and intermediaries develop their business models and their offerings to consumers.⁴⁶⁷ The unsettled nature of exceptions to copyright infringement or the so-called users' rights have rippling effects on the scope of consumers' rights to commercial copies of copyright works as a whole. As one important legal base to delineate copyright consumers' rights, the *CCA*'s uncertain

⁴⁶⁴ See the discussion in Part II C of this chapter.

⁴⁶⁵ See the discussion in Part II D of this chapter.

⁴⁶⁶ See the introductory comments in Part II of this chapter.

⁴⁶⁷ See the concluding remarks in Part IV of this chapter.

rendering of users' rights can also undermine the effective support that property and consumer law offers with respect to copyright consumers' claims to commercial copies of copyright works.

Can we provide a simpler floor plan to copyright consumers and, if so, on what legal and normative base? The place of copyright consumers and what the law allows them to do with copyright works can be better understood by looking at what consumers have in their possession: the copy of a copyright work. To understand this peculiar form of personal property, in constant interaction with copyright holders' exclusive rights, and losing its traditional shape in the world of online distribution, the next chapter introduces basic principles of property law and theory. This will set the foundation for the analysis of the interaction between copyright and commercial copies of copyright works on what I hope is a more level playing field.

Chapter 4

Laying the Framework: Property, Ownership, and Property Limitations

I. Introduction

In Chapter 2 and Chapter 3, I described the unsettled place of copyright users and consumers within the framework of copyright, as well as the unclear status and limited appeal for consumers of so-called users' rights, as they are set out in Canada's *Copyright Act* [CCA].¹ To be able to define copyright consumers' rights, a broader understanding of their rights to commercial copies of copyright works beyond the framework of copyright law is required.

In this chapter, I present the key concepts of property law and theory, in particular, private property, that I will apply to apprehend the peculiar nature of commercial copies of copyright works. To that end, I rely to a large extent on James Harris's theory of property in *Property and Justice*.² Harris's detailed articulation of the heterogeneous nature of property, the ownership spectrum, the operation of property limitations, as well as his characterization of intellectual property motivate this choice in great part. Lawfully acquired copies of copyright works are a unique form of personal property that is heavily subject to the exclusive rights of copyright holders. A better understanding of each set of ownership entitlements as they pertain to copyright works and of the operation of property limitations are critical to the definition of copyright consumers' rights.

In Part II, I summarize the main features of Harris's conception of property and, in particular, his description of the "ownership spectrum." In Part III, I present the main features and significance of the standardization of property through the *numerus clausus* principle. In Part IV, I briefly introduce the controversies around property and theoretical justifications of (intellectual) property that I develop further in Chapter 5 and Chapter 6.³ In Part V, I discuss Harris' theory on the various forms of property limitations and their central function within the property institution. In particular, the justifications for property limitations and their operation provide important insights for understanding the peculiar nature of copy ownership and how it interacts with the exclusive rights of copyright holders in copyright

¹ RSC 1985, c C-42.

² James W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996).

³ In particular, see Chapter 5 Part III, Part IV and Part V and Chapter 6 Part III.

works. In Part VI, I offer concluding remarks on the concepts of property and ownership that I present in this chapter and how they will be applied in subsequent chapters.

II. Property and ownership

In *Property and Justice*, Harris presents the essence of the property institution as the twin manifestation of trespassory rules⁴ and the existence of an ownership spectrum.⁵ These various forms of ownership share in common: (i) a juridical relation between a person and a resource, which implies the ability to identify each and a separateness between the two,⁶ (ii) privileges and powers that are open ended⁷ and (iii) that authorize self-seekingness by the owner.⁸ Self-seekingness refers to this intimate relationship between the owner and the resource as to how she chooses to dispose of the resource, with *prima facie* no duty to account to any one for the merit or rationality of that preference.⁹ The self-seekingness trait on the ownership spectrum of property is an important differentiator to distinguish private property from public property.¹⁰ I will discuss in more detail each of the three components that are common on the ownership spectrum as I apply them to describe the nature of copyright and of commercial copies of copyright works.¹¹ While “full-blooded ownership”¹² is the strongest illustration of all three characteristics on the ownership spectrum, at the other end, mere property embraces “some open-ended set of use-privileges and some open-ended set of powers of control over uses made by others.”¹³ For

⁴ Harris, *supra* note 2 at 25, 86 defines trespassory rules as “all rules which, by reference to a resource, impose obligations (negative or positive) upon an open-ended range of persons,” with the exception of some privileged individual, group, or agency (i.e. the owner(s)). They are open-ended, and give rise to various civil or criminal remedies such as damages, possessory recovery, injunction or restitution. The power to exclude is generally recognized at varying degrees of intensity by property theory scholars as an important feature to describe property: see the discussion further below in Part II of this chapter.

⁵ Harris, *supra* note 2 at 5, 27-30. The variances on the ownership spectrum are theoretically open-ended and infinite, *ibid* at 275.

⁶ Harris, *supra* note 2 at 332; James E Penner, *The Idea of Property in Law* (Oxford: Clarendon, 1997) at 105-128.

⁷ For example, art 947 CCQ defines the right of ownership as “the right to use, enjoy and dispose of property fully and freely, subject to the limits and conditions for doing so determined by law.”

⁸ Harris, *supra* note 2 at 5.

⁹ *Ibid* at 65.

¹⁰ *Ibid* at 108.

¹¹ See the discussion in Chapter 5 Part IV A and in Chapter 6 Part II B.

¹² Harris, *supra* note 2 at 30, defines “Full-blooded ownership” as “the relationship between a person (or persons) and a thing such that he (or they) have *prima facie* unlimited privileges of use or abuse over the thing and *prima facie* unlimited powers of control and transmission, so far as such use or exercise of power does not infringe some property independent prohibition”. I discuss the nature of “property independent prohibitions” and other property limitations in Part V of this Chapter.

¹³ Harris, *supra* note 2 at 29.

instance, full powers of transmission may not be present in the case of mere property, while it is *prima facie* the case of full-blooded ownership.¹⁴ An element of scarcity triggers the need to set up property institutions.¹⁵ In addition to the presence of trespassory rules and the ownership spectrum, every property institution must include: property-limitation rules and expropriation rules, which I discuss below in this chapter.¹⁶

Property is by no means a homogeneous concept.¹⁷ It has evolved since the beginning of time and will likely continue to do so, as an enduring institution to regulate human behaviour and aspirations.¹⁸ Yet, there are important points of commonality that bring together ownership interests, along side quasi-ownership interests and non-ownership proprietary interests, under the umbrella of property and allow important distinctions within and outside the property institution.¹⁹ Property plays a vital role in shaping human beings' identities and how they interact with one and other in all spheres of human and cultural life with respect to both tangible and intangible resources.²⁰ Intellectual property is one relatively recent example of the evolution of the property institution,²¹ and its legitimacy within the property family ignites passionate debates that I will discuss in Chapter 5.²²

¹⁴ *Ibid.*

¹⁵ *Ibid.*, at 24 & fol.

¹⁶ Harris, *supra* note 2 at 34. See the discussion on property limitations in Part IV of this chapter.

¹⁷ Harris, *supra* note 2 at 4. See also Jeremy Waldron, *The right to private property* (Clarendon Press: Oxford, 1988) at 26ff; Mary Jane. Mossman & William F. Flanagan, *Property Law Cases and Commentary*, 2d ed. (Toronto: Emond Montgomery Publications, 2004) at 2.

¹⁸ Harris, *supra* note 2 at 4; Eduardo M. Penalver & Sonia K. Katyal, *Property Outlaws* (New Haven and London: Yale University Press, 2010) at 27.

¹⁹ Harris, *supra* note 2 at 141: the three groups of interests “build upon the twinned and mutually irreducible notions of trespassory rules and the ownership spectrum.” and at 139, property comprises “(1) ownership and quasi-ownership interests in things (tangible or ideational); (2) other rights over such things which are enforceable against all-comers (non-ownership proprietary interests); (3) money; and (4) cashable rights.” I will define further ownership interests and non-ownership proprietary interests as I apply them to define the nature of copyright in Chapter 5 and the nature of commercial copies of copyright works in Chapter 6. Harris, *ibid* at 139-142, acknowledges the difficulty of arriving at one unifying and complete definition of property, focusing rather on underscoring its salient features.

²⁰ *Ibid.* Tony Honoré, “Ownership” in Tony Honoré *Making Law Bind, Essays Legal and Philosophical*, (Clarendon Press: Oxford, 1987) 161 at 161. The original version of this essay was published in A.G. Guest, ed., *Oxford Essays in Jurisprudence* (1961).

²¹ *Ibid.*

²² See the discussion in Chapter 5 Part III, Part IV and Part V.

Harris offers one account (among numerous accounts) of the main attributes of property and of the nature of ownership.²³ The “twin-manifestation” framework that Harris proposes to define the property institution emphasizes the “bundle of rights” characteristic that is often ascribed to property, as well as supported by the power to exclude, opposable to all.²⁴ Commentators define the distinctive nature of property in different ways: e.g., as being the power to exclude more than the bundle of rights and vice versa,²⁵ or both,²⁶ or neither.²⁷ Conceptions of property include the “thing”²⁸ or a relation; either person-to-person,²⁹ person-to-things,³⁰ or person-to-person through things.³¹ The emphasis on certain

²³ On the concept of ownership, see Honoré, *supra* note 20, in particular at 165-179 where he provides a detailed account of the incidents of ownership which include: the right to possess, the right to use, the right to manage, the right to the income and capital of the thing, the right to security and the duty to prevent harm. James O. Grunebaum, *Private Ownership* (London, New York: Routledge & Kegan Paul, 1987), developed a theory of “autonomous ownership” that is divided in three main categories based on the nature of the resource that is owned, i.e., domains of land and resources, domains of self and labour and the domain of “mixed ownables”: *ibid* at 3 and 182.

²⁴ Harris, *supra* note 2 at 5, i.e. through describing property institutions as encompassing the twin manifestation of trespassory rules and the presence of an ownership spectrum which comprises powers and privileges between a person and a resource that are *prima facie* open-ended.

²⁵ For example, for Waldron, *supra* note 17 at 294, the essential characteristics of property are: the right to exclude others from the use of a resource, the exclusive right to determine what shall be done with a resource and the power to alienate one’s rights over a resource on whatever terms one thinks appropriate. He emphasizes how the freedom of choice in the economic sphere is of paramount importance. See Honoré, *supra* note 20; see also Stephen R. Munzer *A Theory of Property* (Cambridge: Cambridge University Press, 1990) at 22-27, where the author builds upon the works of Hohfeld and Honoré and emphasizes the bundle of incidents of property as they relate to objects.

²⁶ Harris, *supra* note 2, would likely fall in that category.

²⁷ Hanoch Dagan, *Property Values and Institutions* (Oxford: Oxford University Press, 2011) at 40-41.

²⁸ Munzer, *supra* note 25 at 16-17 describes this definition of property as the laymen’s view as opposed to a more sophisticated view of property which defines it through relationships between persons and objects. See also Henry E. Smith, “Property as the law of things” (2012) 125 Harv. L. Rev. 1691, who criticizes the bundle of stick or bundle of rights theories of property and argues that we need to replace the “thing” at the centre of property as a “law of modular things” as supported or explained through information costs justifications.

²⁹ Wesley N. Hohfeld: Wesley N. Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1917) 26 Yale L.J. 710; Wesley N. Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 Yale L.J. 16. Harris, *supra* note 2 at 121-124 reviews Hohfeld’s theory of property interests to conclude that Hohfeld’s account of property interests that focuses on relationships is incomplete and explains why we cannot dispense of the person-thing relationship. See also the analysis and critique of Hohfeld’s contribution to defining the dynamics within property in Munzer, *supra* note 25 at 17-22.

³⁰ Harris, *supra* note 2 at 142 views property as “interests in things”. For a discussion on the theories emphasizing the “person to person” and “person to thing” essential characteristics of property: see Lisa Austin “Person, Place, Or Thing? Property And The Structuring Of Social Relations” (2010) 60 University Of Toronto Law Journal 445.

³¹ David Lametti, “Concept of Property: Relations through Objects of Social Wealth” (2003) 53 U. Toronto L.J. 325 [Lametti 2003] at 355 defines private property in part as: “a social institution that comprises a variety of contextual relationships among individuals through objects of social wealth and is meant to serve a variety of individual and collective purposes.” For an overview of different conceptions on the nature of

characteristics over others involves selecting and discriminating among complex concepts that reflect values and lead to different interpretations.³² One should guard against attempts to impose too much uniformity when describing property, as uniformity can limit its ability to adapt and evolve.³³ Rather, each form of property right needs to be contextualized in accordance with its underlying objectives and the nature of the resource to which it pertains.³⁴ According to Harris, we need to understand the underlying “property-specific justice reasons” that withstand each form of property to determine its proper scope.³⁵

Harris’s influential conception of property³⁶ has been criticized for the central place of the “ownership spectrum” in his theory and its too strong emphasis on property rights with little to no account of corresponding owner duties and obligations.³⁷ More specifically, Harris’s reference to “full-blooded ownership” may not exist in theory and even less in practice.³⁸ The “ownership spectrum” (including “full-blooded ownership”) that Harris meticulously unfolds needs to be qualified by the fact that no ownership freedoms are ever immune to challenge.³⁹ The property institution includes expropriation rules and property-limitation rules,⁴⁰ as well as limitations *external* to property, i.e., “property-independent rules.”⁴¹ These constraints on ownership and property can be translated into rights and duties of property owners and play a central role in Harris’s theory on the main attributes and justifications of property.

property see Munzer, *supra* note 25 at 16-17. For a recent review of the various theories and ongoing debates on the nature and main characteristics of property see: Abraham Bell & Gideon Parchomovsky, “A theory of Property” (2005) 90 Cornell L. Rev. 531 at 541-551, where the authors divide theories of property in two main camps: the “instrumentalists”, who view property as the result of default contract rules and “conceptualists” who place a large emphasis on the fact that the rights are opposable to all, as well as privileged rights including the right to exclude, to use, and to transfer.

³² For example, see Dagan, *supra* note 27 at 44 who explains how an over emphasis on the power to exclude as the rule and the limitations as exceptions evacuates the notion of social responsibility embedded in property. See also Lametti 2003, *supra* note 31 at 377.

³³ For Dagan, *supra* note 27 at 43, too much uniformity “would undermine the freedom-enhancing pluralism and the individuality-enhancing multiplicity so crucial to the liberal ideal of justice.”

³⁴ Dagan, *supra* note 27 at 42.

³⁵ Harris, *supra* note 2 at 168.

³⁶ See Timothy Endicott, Joshua Getzler & Edwin Peel, eds, *Properties of Law: Essays in Honour of Jim Harris* (Oxford: OUP, 2006).

³⁷ For example, see Lametti 2003, *supra* note 31, in particular at 356 -360 where the author offers a detailed analysis and critique of Harris’s theory.

³⁸ *Ibid* at 364.

³⁹ Harris, *supra* note 2 at 275.

⁴⁰ Harris, *supra* note 2 at 34.

⁴¹ *Ibid* at 32-33. See also the discussion on property limitations in Part V of this chapter.

As I will demonstrate throughout the Second Part of my thesis and beyond, Harris's framework on the key attributes of property is particularly valuable in defining consumers' rights to commercial copies of copyright works. The trespassory rules or opposability to all emphasize important distinctions and considerations between the statutory regime of copyright and how copyright exclusive rights can be extended by contract. The *ownership spectrum* and the gradation of rights it describes help decorticate the powers and privileges of copyright holders over their incorporeal resource, copyright, as well as the powers and privileges of the personal property owners of the corporeal resource (the commercial copy) embedding the copyright work. Here, two separate forms of property (corporeal and incorporeal) owned by different owners pertain to the same object, the copyright work. To what extent do the powers and privileges of one owner limit the powers and privileges of the other *simultaneous* owner, and to what extent do they co-exist? To what extent does each bundle of rights impact, shape, or define one's own resource and the resource of the other?⁴² Harris's property theory framework, including the operation of property limitations, provides compelling analytical tools to mediate between consumers and copyright holders' rights in relation to copyright works.⁴³

To sum up on the key concepts of private property and ownership that I will apply when defining the nature of and rights pertaining to commercial copies of copyright works, Harris's twin manifestation of trespassory rules and the ownership spectrum emphasize the *opposability to all* feature of property and the *prima facie* open-ended feature between a person and a resource.⁴⁴ At the same time, the open-ended texture of ownership interests does not preclude the existence of various forms of limitations, which, as I discuss below in this chapter, are an integral part of property and how it is regulated.⁴⁵ Prior to that, I will turn to another important aspect of the property institution that is commonly referred to as the *numerus clausus* or standardization of property, and is needed for the proper understanding of copyright and copy ownership.

⁴² I apply Harris, *supra* note 2, framework of ownership spectrum to describe the nature of copyright in Chapter 5 and the nature of copy ownership in Chapter 6.

⁴³ I discuss Harris, *supra* note 2, theory of property limitations in Part V of this chapter. I apply the concept of property limitations to copyright and copy ownership in Chapter 7.

⁴⁴ Harris, *supra* note 2 at 5, 25, 29-30.

⁴⁵ See the discussion on property limitations in this Part V of this chapter.

III. The standardization of property: the *numerus clausus* principle

Numerus clausus is the principle in which there is a fixed and closed list of property rights recognized by law and, as one corollary, limitations on how owners can alter the nature of their property rights.⁴⁶ This concept is generally understood to be part of the civil law tradition, although it is not immune from inconsistencies in its application.⁴⁷ The civil law typically enumerates the entitlements of ownership⁴⁸ and its possible dismemberments.⁴⁹ The restriction on “the exercise of the right to dispose of property” is explicitly prohibited except in limited circumstances,⁵⁰ and is subject to specific conditions.⁵¹ There is a growing recognition that a similar principle exists in the common law of property.⁵² Thomas Merrill and Henry Smith conducted a survey on the common law of property to demonstrate that the same principle exists in this legal tradition, although not uniformly and without bearing any specific appellation.⁵³ For Merrill and Smith, *numerus clausus* is best described as a “norm of judicial self-governance” rather than as a statutory or constitutional tool of interpretation.⁵⁴ It is “an extremely important qualification of the freedom of contract.”⁵⁵ Through the application of *numerus clausus*, courts will generally be reluctant to enforce contracts that are meant to alter the bundle of rights that apply to a resource in a form other than known property rights.

According to Merrill and Smith, the *numerus clausus* principle flows from the *opposability to all* feature

⁴⁶ Harris, *supra* note 2 at 58.

⁴⁷ Lametti 2003, *supra* note 31 at 360-361, on how *numerus clausus* applies in the Québec civil law system.

⁴⁸ Art. 947 CCQ enumerates the rights of ownership as: “the right to use, enjoy and dispose of property fully and freely, ...”

⁴⁹ Art 1119 CCQ lists the dismemberments of ownership as “usufruct, use, servitude and emphyteusis” and confirms that they are real rights.

⁵⁰ Art. 1212 CCQ imposes this prohibition, except if it is done by gift or will.

⁵¹ *Ibid*: it needs to be in writing and it is only valid “if it is temporary and justified by a serious and legitimate interest. Art. 1214 CCQ provides that: “it may not be set up against third persons uses unless it is published in the proper register.”

⁵² Thomas Merrill & Henry Smith, “Optimal Standardization in the Law of Property: the Numerus Clausus Principle” (2000) 110 Yale L.J. 1; Henry Hansmann & Reinier Kraakman, “Property, Contract, and Verification: the Numerus Clausus Problem and the Divisibility of Rights” (2002) 31 J. Legal Stud. 373. See also Dagan, *supra* note 27 at 4, on why the author supports the *numerus clausus* principle within the institutions of property.

⁵³ Merrill & Smith, *supra* note 52 at 9-23.

⁵⁴ *Ibid* at 11: “Jurisprudentially speaking, the *numerus clausus* functions in the common law much like a canon of interpretation, albeit a canon that applies to common-law decision making rather than statutory or constitutional interpretation, or like a strong default rule in the interpretation of property rights.”

⁵⁵ *Ibid* at 5-6.

of property and serves to reduce the overall information costs with respect to similar rights.⁵⁶ Inspired by the rationale of the 19th-century English case *Keppell v Bailey*,⁵⁷ Merrill and Smith applied a law and economics analysis to explain the dynamics at play as the need to constrain the information processing costs of parties that are not privy to a contract that creates another species of property rights:

by allowing even one person to create an idiosyncratic property right, the information processing costs of all persons who have existing or potential interests in this type of property go up. This external cost on other market participants forms the basis of our explanation of the *numerus clausus*.⁵⁸

As a result, this feature of the property institution reflects the need to reach “the optimal standardization of property law.”⁵⁹ Other commentators, such as Henry Hansmann & Reinier Kraakman, offer different explanations behind the *raison d’être* of *numerus clausus*.⁶⁰

The efficiency rationale invoked by Merrill and Smith to justify maintaining a uniformity of property interests is a compelling justification that benefits: all community members who have similar ownership rights to the ones of the owner who alters them through one transaction, and also future transferees of the resource to which the ownership rights have been altered in an unconventional manner. The need to standardize the forms of property rights is as much the prerequisite of the opposability to all incidents of

⁵⁶ Merrill & Smith, *supra* note 52 at 8.

⁵⁷ (1834) 39 Eng. Rep. 1042 (Ch.). In that case, the Court of Chancery had to interpret the terms of a contract that in effect, did not create rights that fell within recognized types of servitudes enforceable against subsequent purchasers. Lord Chancellor Brougham enunciated the detrimental consequences of enforcing the contractual rights as new forms of property as follows: “great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed.”: *Ibid* at 1049.

⁵⁸ Merrill & Smith, *supra* note 52 at 27.

⁵⁹ Merrill & Smith, *supra* note 52.

⁶⁰ Hansmann & Kraakman, *supra* note 52 at 374-375, explain the *numerus clausus* principle not so much by the need to standardize rights as the need to aid potential purchasers to limit their “verification costs.” For them: “The law’s limitations on property rights take the form not of standardization into a discreet number of well-defined forms, but rather of regulation of the types and degree of notice required to establish different types of property rights.” Dagan, *supra* note 27 at 33 justifies the need to standardize property as follows: “the best justification for the standardization of property lies in the internal dimension—within, rather than without, the zone of privity. Limiting the number of property forms and standardizing their content facilitates the roles of property in consolidating expectations and expressing ideal forms of relationship. Conversely, an open-ended approach to property or a failure to sustain the normative integrity of the institutions of property would have undermined both law’s role in consolidating expectations and its function in expressing such normative ideals.”

property as it is the rectifying tool to preserve it. How can a right efficiently be opposable to all if it can always be subject to innumerable customizations and alterations? And how can this distinctive feature of property survive without maintaining that standardization?

Commentators debate the existence of the *numerus clausus* principle in the common law tradition.⁶¹ In the context of analyzing the rationale behind courts' reticence to enforce personal property servitudes, Glen O. Robinson raises doubts about the existence and justification of the *numerus clausus* principle in the common law of property, both legally and normatively.⁶² He is unconvinced that the application of the *numerus clausus* principle is justified by the need to reduce the information processing costs of the relevant audiences, as the needs for information are so varied.⁶³ For Robinson, the principle is hard to reconcile with the need to adapt property rights to the various needs of property owners.⁶⁴ The notification of terms can in fact reduce information costs without the standardization of property.⁶⁵

The argument that favours tailored property interests to suit individual needs over the standardization of property has some merit when it can be established that consumers have a broad range of needs with respect to specific products and that the market is able to respond to those individual preferences. Obviously, the argument of choice is relevant only to the extent that the preference of the consumer is one that the application of the standardization of property would restrict. It is questionable whether consumers have highly diverse needs and expectations for mundane products, such as digital copies of music, film, or mass-market computer software.⁶⁶ Also, in consumer transactions of commercial copies of copyright works, there are indications that at least some of the restrictions imposed on the commercial copies are widespread rather than varied and individualized, e.g., restrictions on alienation of the commercial copy, or on the ability to produce derivative works from the work embedded in the commercial copy.⁶⁷ Restrictions on the alienation of commercial copies increase the power and control of copyright holders over the commercialization of their works and are unlikely to be in place to

⁶¹ For example, see Glen O. Robinson, "Personal Property Servitudes" (2004) 71 U. Chi. L. Rev. 1449.

⁶² *Ibid* at 1482ff.

⁶³ *Ibid* at 1485.

⁶⁴ *Ibid*.

⁶⁵ *Ibid* at 1487.

⁶⁶ As I discussed in Chapter 2 Part IV, "consumer" refers to individuals who make transactions for personal or household purposes and not for business purposes. By definition, this limits the scope of needs and preferences.

⁶⁷ See the analysis of selected non-negotiated standard end-user agreements in Chapter 3 Part III C.

respond to specific consumer needs.⁶⁸ While the restrictions on alienation of the commercial copy would typically fall within the purview of contractual clauses that the application of the *numerus clausus* principle could set aside, the application of the *numerus clausus* principle would not set aside restrictions such as the prohibition of the creation of derivative works. The right to create derivative works is part of copyright holders' exclusive rights, while the right to control the subsequent transfer of copies of copyright works, except in the case of loan or rental, is not typically so.⁶⁹

The argument that notification can reduce information costs without resorting to the standardization of property depends on the ability of the notification to effectively communicate a new property interest.⁷⁰ Even assuming that a notice meets the standard of effective communication that implies that consumers will understand its meaning and ramifications, it is questionable that notices could ever reduce information transaction costs to the same extent that the standardization of property can. A limited list of forms of property will always, conceptually, be more efficient than notifications giving potential rise to different forms of property interests for each new transaction. Even if a new form of property interest becomes an industry norm, consumers would never know for sure because it could always be subject to change and remain within the control of suppliers.

The skepticism about the standardization of property can be justified to some extent when the *numerus clausus* principle implicates a trade-off: more standardization gives rise to greater efficiency for the collectivity of owners of similar interests; however it may reduce some choices (assuming that consumers have myriad preferences for a particular product, that the market adequately responds to individual consumer preferences, and that the choices in question would be of a nature to be limited through the standardization of property). In the case of mundane consumer transactions of commercial copies of copyright works, it is not clear that the standardization of property would limit choices for consumers. In the context of the mass commercialization of information products, perhaps reasons other

⁶⁸ A distinction needs to be made between the rental of a commercial copy which would restrict alienation powers while at the same time responding to specific consumer needs and a transaction that would resemble a sale in all other material aspects except for the restriction on alienation of the commercial copy: see the discussion in Chapter 7 Part IV and Chapter 8 Part II C.

⁶⁹ I discuss copyright holders' right to control the subsequent transfer of commercial copies of their works through the application of the exclusive distribution right and the principle of exhaustion or first sale doctrine in Chapter 3 Part II F, Chapter 7 Part III A (ii) and Chapter 8 Part IV.

⁷⁰ E.g., a prominent notice on packaging of commercial copy of copyright work would more effectively reduce information costs than a clause in lengthy terms and conditions.

than economic efficiency support the application of the *numerus clausus* principle, including the need to rectify various asymmetries between suppliers and purchasers.⁷¹

Commentators who doubt the existence of the *numerus clausus* principle minimize the distinctive nature of property as opposable to all. For Robinson, property and contracts are two forms of private ordering and, on that basis, he questions why courts should give precedence to the former over the latter by refusing to enforce contract clauses that go against, *inter alia*, the standardization of property.⁷² The freedom of contract of private parties should prevail over broader collective implications and the standardization of property to accommodate individual needs.⁷³ I discuss in Chapter 7, the ramifications of these conflicting views of the standardization of property on the enforceability of restrictive terms and conditions in commercial transactions of copies of copyright works.⁷⁴

The issue of the *numerus clausus* principle limiting the existing forms of property⁷⁵ is put to the test when it is applied to the nature of copyright, copy ownership, and the contractual environment in which copies of copyright works are made commercially available. As I discuss in Chapter 5 and Chapter 6, the application of the *numerus clausus* principle to the nature of copyright and of copy ownership provides important insights about their distinctive features.⁷⁶ In Chapter 7, I look at how the *numerus clausus* principle can mediate between the objectives that withstand the existence of copyright as set out in the CCA, and the *prima facie* open-ended freedom and power of copyright holders to exploit their

⁷¹ See the discussion in Chapter 7 Part IV on the application of the *numerus clausus* principle to consumer transactions of copies of copyright works. I discuss the theory of asymmetries to justify consumer protection regulation in Chapter 10. See also Molly Shaffer Van Houweling, “The New Servitudes” (2008) 96 Geo. L.J. 885 in particular at 924-949, where the author raises concerns on contractual restrictions on information products’ uses, which the author calls “the new servitudes”, by looking at three main areas of concern that arise with respect to real property and personal property servitudes, i.e.: notice and information costs, the problem of the future and externalities.

⁷² Robinson, *supra* note 61 at 1477-1478.

⁷³ *Ibid.*

⁷⁴ See the discussion in Chapter 7 Part IV on the mediation between copyright, copy ownership, and contract through the standardization of property.

⁷⁵ Merrill & Smith, *supra* note 52 at 11.

⁷⁶ I discuss the implications of the application of the *numerus clausus* principle to copyright in Chapter 5, and apply the *numerus clausus* principle to copy ownership in Chapter 6 Part II C.

exclusive rights as they wish.⁷⁷

In addition to the controversies that subsist around the existence of the *numerus clausus* principle within the property institution, there is a more fundamental controversy about the underlying justifications of property and intellectual property that I will introduce next for the purpose of their further application in Chapter 6.⁷⁸

IV. Justifications of and controversies around (intellectual) property

As I set out the general and relevant characteristics of property for the analysis of copyright and copy ownership, it is opportune at this stage to briefly introduce the property justifications that are relevant to copy owners, with references to copyright holders. As I will discuss chapter 6, the scope of the ownership rights in commercial copies of copyright works is largely determined by the scope of copyright.⁷⁹ As a result, the justifications behind the ownership rights in commercial copies of copyright works are interwoven with the justifications for the exclusive rights conferred by copyright.⁸⁰ I analyze the nature and effects of the various theoretical justifications of copy ownership and copyright more extensively in Chapter 6.⁸¹

Property, and particularly private property, is a controversial institution. As Harris explains:

a property institution at least confers some private domain over some scarce things, so that the separateness of persons is made evident in the face of collective decision-making. But that domain necessarily confers some power over others and hence is distributionally problematic.⁸²

Any theoretical justification of property needs to take into account the distributive effects of property regimes.⁸³ Because of its broader ramifications, property is necessarily social and does not merely create individual rights with powers to exclude.⁸⁴

⁷⁷ In Chapter 7, Part IV, I look at how the *numerus clausus* principle can be applied to the manner by which copyright holders exploit their exclusive rights.

⁷⁸ See the discussion in Chapter 6 Part III.

⁷⁹ See the discussion in Chapter 6 Part II.

⁸⁰ See the discussion in Chapter 6 Part III.

⁸¹ I apply selected theoretical justifications of property to copy ownership and copyright in Chapter 6 Part III.

⁸² Harris, *supra* note 2, at 165; Grunebaum, *supra* note 23 at 169-170, his theory of private property and the concept of autonomous ownership lead him to conclude that private ownership is not morally justified.

However, in the case of copyright, the controversy around the proper scope of exclusive rights conferred does not arise as a result of scarce resources. Many forms of copyright works can be reproduced infinitely without depriving the original copyright holder and subsequent users of its enjoyment. Rather, it is the non-rivalrous nature of the works protected by copyright and the scope of the artificially created scarcity through copyright law that give rise to ongoing deliberations and passionate debate.⁸⁵

Distribution issues on the extent to which this species of private property should unfold remain. The linkage of copyright to property, either in an attempt to define the nature of the right or by reference to property theories to justify its existence, is also the subject of ongoing debate and controversy.⁸⁶

One corollary of the controversial nature of property is that there is no apparent single satisfactory unifying justificatory theory. Arriving at a cogent theory of property and intellectual property may in fact necessitate the co-existence of different underlying justifications.⁸⁷ The need to resort to various theoretical justifications to adequately justify property is attributable in part to the heterogeneous nature of property, and in the case of copyright, to the distinct nature of the exclusive rights that it confers.⁸⁸ A pluralistic approach to justify property can also be attributable to the different understandings of the concept of property and of the fact that it implicates incommensurable values.⁸⁹ On that ground, seemingly conflicting theories can play a complementary role in justifying the property institution.⁹⁰ In

⁸³ For example see: Rashree Chandra, *Knowledge as Property* (New Delhi: Oxford University press, 2010) at 61. Related to this idea, the author notes that “all property systems distribute freedoms and unfreedoms; no system of property can be described, without qualification, as a system of liberty.”

⁸⁴ Lametti 2003, *supra* note 31 at 347.

⁸⁵ See the discussion in Chapter 6 Part III.

⁸⁶ I discuss the debate that surrounds the nature of copyright as property or not in Chapter 5 Part III.

⁸⁷ Harris, *supra* note 2 at 13. See the summary of Harris’ theoretical justification of property further below in Part IV of this chapter. With respect to intellectual property, see: Joseph P. Liu, “Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership” (2001) *William and Mary Law Review*, 1245 at 1300, who takes a pluralistic approach to justify copyright in a US context. See also the discussion in Chapter 6 Part III.

⁸⁸ For instance, there are likely to be distinct justifications to the exclusive right to authorize first publication, which has strong privacy and autonomy based moral justifications, from the exclusive right to authorize reproduction of a copyright work which under the predominant view, is justified for instrumental reasons of promoting the creation and dissemination of works: see the discussion in Chapter 6 Part III. On the distinct justification for the right to authorize first publication, see Sunny Handa, *Copyright Law in Canada*, (Markham, Ontario: Butterworth Canada, 2002) at 107 & fol.

⁸⁹ See Waldron, *supra* note 17 at 16ff., where the author describes four different conceptions of the right to private property as follows: immunities against expropriation; natural property rights; the eligibility to hold property; and a general right to property; Gregory S. Alexander, Eduardo M. Penalver, Joseph William Singer & Laura S. Underkuffler, “A Statement of Progressive Property” (2008-2009) 94 *Cornell L. Rev.* 743 at 744.

⁹⁰ See the discussion in Chapter 6 Part III. On a related idea, for Alexander, Penalver, Singer & Underkuffler, *supra* note 89, because the incommensurable plural values that are implicated in property

fact, courts, legislators, and commentators are influenced by various theories when deciding on the scope of property (including intellectual property) rights.⁹¹

The justificatory theories of property developed by Harris, and upon which I build a theory of copy ownership, reflect a pluralistic approach.⁹² After an extensive review of natural property theories,⁹³ property and freedom,⁹⁴ and the instrumental values of property,⁹⁵ Harris concludes that there exists no natural right to full-blooded ownership⁹⁶ and that “the surviving property-specific justice reasons include the *prima facie* normative status of all ownership freedoms” and, to a lesser extent, “privacy, convention-dependent conceptions of labour-desert,” as well as “pragmatic recognition of the wealth-creating potential of incentives and markets.”⁹⁷ I will explore in Chapter 6 the *prima facie* status of all

“relate to qualitatively distinct aspects of human experience, they cannot be adequately understood or analyzed through a single metric. Reducing such values as health, friendship, human dignity, and environmental integrity to one common currency distorts their intrinsic worth.”

⁹¹ See the discussion in Chapter 6 Part III.

⁹² See the discussion further below in Part IV of this chapter. See also David Lametti: “The Morality of James Harris’s Theory of Property”, in Timothy Endicott, Joshua Getzler & Edwin Peel, eds, *The Properties of Law: Essays in Honour of James Harris* (Oxford: OUP, 2006) [Lametti 2006] at 145.

⁹³ Harris, *supra* note 2 at 182-228, namely as it is associated with labour (i.e. the concept of self-ownership, creation-without –wrong and labour-desert theories) and the assault analogy (i.e. first occupancy, personhood-constituting and privacy theories).

⁹⁴ Harris, *supra* note 2 at 230-277, in particular, a review of Hegel’s conception of property freedoms, as well as criticism of property freedoms including the problem of fetishism, disparities in wealth and domination-potential.

⁹⁵ *Ibid.*, at 278-306.

⁹⁶ *Ibid.*, *supra* note 2 at 182-229, reviews various theories to justify a natural right to property to conclude that there is no natural right to full-blooded ownership: “...no relationship between an individual and a resource arises such that just treatment of the individual requires that a property institution both surround the resource with trespassory rules availing the individual and any one to whom he chooses to transfer the resource and also conferring on the individual unlimited use privileges, control –powers, and powers of transmission over the resource.”(at 228). Harris refutes labour theories relying on self –ownership to justify a natural right in the fruits of their labour as an extension of individuals owning themselves (because self-ownership is a *non sequitur*, i.e. from the premise that no one can own an individual, it does not necessarily follow that the individual can own himself). Yet Harris, sees an important property specific justice reason in the fruits of one’s labour that provides the “shell of a natural right”, i.e. that the need for the reward to be ownership does not follow, rather, a person has a just claim for a portion of social wealth that is created by her work when her work is by convention valued by others and by convention, gives some entitlements to a reward. He also reviews the creation without wrong justification for a natural property right as being an important property justice reason but not the foundation of a natural right, because the creator cannot impose unilateral trespassory rights. Harris explores first occupancy theories and personhood-constituting theories, derived from bodily integrity. In the latter case, only in exceptional specific cases could there be a natural right derived from the personhood constituting aspect of the resource, i.e. a natural non-transferable limited right on specific resources having this character (e.g. never to be seen diaries, sacred mementos). Harris also recognizes the shell of a natural right that is based on privacy that is hostage “to the problematic balance between the requirement of a range of specially protected autonomous choice and necessary intervention by the community to prevent abuse.” (at 227).

⁹⁷ *Ibid.*, at 13.

ownership freedoms, the role of instrumentalist and labour-desert theories, and their impact on the nature and scope of ownership rights in copies of copyright works.⁹⁸ Prior to that, I will introduce one last key component of the theoretical framework of property that I lay out in this chapter, i.e., the concept of property limitations.

V. The limitations to property

One of the strengths of Harris's theory of property lies in his account of the nature and operation of limitations to property.⁹⁹ Understanding the limitations of property is critical when seeking to define the scope of consumers' rights in commercial copies of copyright works that are constrained by copyright.¹⁰⁰ While all ownership freedoms have *prima facie* normative value, none of them is immune from various forms of limitations.¹⁰¹ In the Québec civil law, this is reflected by article 947 of the *Québec Civil Code*¹⁰² and by the jurisprudence related thereto.¹⁰³ A communitarian approach to property conveys the similar idea that ownership entails obligations and thus limitations that are justified by the necessity to promote human flourishing in the communities we live in.¹⁰⁴ For instance, Gregory S.

⁹⁸ See the discussion in Chapter 6 Part III.

⁹⁹ Harris, *supra* note 2 at 32-37, 332-361.

¹⁰⁰ See the discussion on the nature of commercial copies of copyright works in Chapter 6 Part II. Gregory S. Alexander, "The Social-Obligation Norm in American Property law" (2008-2009) 94 *Cornell L.Rev.* 745, at 811, develops a social obligation norm theory in U.S. property law, based on the need to promote "human flourishing", under which a more nuanced view of the right to exclude is presented. He uses the example of the exclusive rights conferred by copyright as one instance where the interdependency between the copyright holder and the community to which copyright works are intended impose social obligations which in turn impact on the scope of her exclusive rights. See also in the context of property applied to copyright see: Christopher M. Newman, "Transformation in Property and Copyright" (2011) 56 *Villanova Law Review* 251 at 259, where the author comments on the fundamental feature of property as the power to exclude as being accurate to a certain extent only and potentially misleading: "It is also highly misleading, however, because it obscures the fact that property actually *has* goals beyond exclusion that place limits on the right to exclude. Property, too, is an attempt to achieve a carefully calibrated balance between protecting an interest and preserving freedom of action. Exclusion is not an end in itself, but part of the strategy for achieving this balance."

¹⁰¹ Harris, *supra* note 2 at 275: from Harris' standpoint, there exists no natural right to "full-blooded ownership" that are not dependent of some social convention.

¹⁰² Art 947 CCQ: "Ownership is the right to use, enjoy and dispose of property fully and freely, subject to the limits and conditions for doing so determined by law."

¹⁰³ For example, for a summary of the main principles derived from the jurisprudence on art 947 CCQ and how limitations to property may apply see: 2781875 *Canada Inc. c. 91266403 Québec Inc.*- 2003 WL 22480807 (CS Que) (in that case with respect to the right of property to land).

¹⁰⁴ For example, see Gregory S. Alexander & Eduardo M. Penalver, "Properties of Community" (2009) 10 *Theoretical Inq. L.*, 127, at 138ff. where the authors elaborate on the concept of dependence and obligation, i.e., that the capabilities essential to "human flourishing", on which they base their theory of property, "cannot be acquired by individuals in isolation by themselves"; Alexander, *supra* note 100 at 795-796: "Private ownership of those aspects of a society's infrastructure upon which the civic culture depends

Alexander distinguishes two broad categories of property limitations that are based on whether a liability rule applies or not.¹⁰⁵ While communitarian theories of property have a general appeal for the purpose of defining consumers' rights to commercial copies of copyright work, their appeal is even greater in broader discussions about developing a robust public domain in contrast to the exclusive rights of copyright holders.¹⁰⁶ I have discussed in Chapter 2 how copyright consumers' rights raise specific issues that are not always well served by arguments for the preservation of the public domain and the public interest.¹⁰⁷ Harris's account of the various forms of property limitations provides a level of specificity that can help mediate between competing private interests, as is the case between copyright holders and consumers with respect to the same object, i.e., the copyright work.

Harris describes various forms of property limitations, four of which (i.e., the main ones) I shall briefly summarize here. The first refers to "property-independent prohibitions."¹⁰⁸ While they effectively limit the open-ended-use privileges of an owned resource, they do so regardless of the status of ownership. They also vary in time and in space. Safety regulation could fall in that category, as well as criminal law prohibitions. For example, the fact that you own a music CD does not entitle you, or anyone having it in her possession, to force it down someone's throat (besides the fact that it would be physically impossible to do so). Property-independent prohibitions signal that certain uses prohibited to all are not

comes with special obligations" and at 819, where Alexander justifies the owner obligations that the social-obligation theory implies, in contrast with a law and economic approach to property, as follows: "it recognizes that the obligation imposed on owners to sacrifice their property interests in some way can often be justified on the basis of cultivating the conditions necessary for members of our communities to live well-lived lives and to promote just social relations, where justice means something more than simply aggregate wealth-maximization."

¹⁰⁵ Alexander, *supra* note 100. Alexander defines two forms of property limitations. The first one is referred to as "entitlement sacrifices" where the property right is taken away from the owner (ex. forced sales in case of expropriation) but where the property owner is entitled to fair compensation (for this limitation, Alexander relies on the power of "eminent domain" which represents "collective judgment that the state is justified in demanding of us, as members of the political and social community that nurtures us as flourishing individuals, under certain conditions, the sacrifice of title to our land in exchange for just compensation", *ibid* at 776). The second property limitation is referred to as "use sacrifices" under which property owners keep their property rights but those rights are subject to some limitations of uses that community regards as being against its collective interest (for example heritage conservation cases, environmental preservation cases). The first limitation maps out to Harris expropriation rule. The second limitation would overlap with Harris' "property independent rules" and "property-limitation rules" as discussed in Part V of this chapter.

¹⁰⁶ Alexander & Penalver, *supra* note 104 at 129, where the authors observe that "discussions on private ownership are focused on owners and all others are reduced to category of non-owners," and that this "obscures possibility that the community may have a moral status distinct from neighboring owners and non-owning individuals."

¹⁰⁷ See the discussion in Chapter 2 Part II.

¹⁰⁸ Harris, *supra* note 2 at 32-33.

prima facie part of the rights of even fool-blooded ownership.¹⁰⁹ This principle is reflected in article 947 CCQ.¹¹⁰

The second property limitation refers to “property-limitation rules,” i.e., when the *prima facie* open-ended privileges and powers of ownership are overridden.¹¹¹ All property institutions are subject to various forms of property-limitation rules,¹¹² which are more frequent with respect to land than with respect to chattels.¹¹³ Examples of property-limitation rules include the common law tort of nuisance, and limitations on the freedom to transfer property, for instance through the application of antitrust laws, or the application of fair dealing or fair use to limit the exclusive rights of copyright holders in specific cases.¹¹⁴ They would also include the limitations imposed on property owners under environmental laws.¹¹⁵ As it is the case with property-independent prohibitions, property-limitation rules may vary in time and in place. Property-limitation rules differ from property-independent prohibitions in that what they prohibit relates to an alleged harmful exercise of otherwise *prima facie* open-ended ownership privileges or powers, or one that by its nature is specifically addressed to owners and that raises public policy or distribution issues.¹¹⁶ The normative exercise to assess the merit of property-limitation rules involves a balancing act between the values taken to be inherent in ownership, the freedom to act self-seekingly in relation to that which is one’s own, and other values, individual or social.¹¹⁷ One property nuisance case from the High Court of Australia, *Victoria Park Racing and Recreation Grounds Co. Ltd. v Taylor [Victoria Park]*¹¹⁸ is a good illustration of how courts mediate

¹⁰⁹ *Ibid.*

¹¹⁰ *Supra* note 94.

¹¹¹ Harris, *supra* note 2 at 34.

¹¹² *Ibid* at 33.

¹¹³ *Ibid* at 90.

¹¹⁴ Environmental conservation would be another example as well as other statutory restrictions. See Harris, *supra* note 2 at 35. See the discussion on fair dealing in Chapter 3 Part II C. For the application of property-limitation rules to copyright, see Chapter 7 Part III.

¹¹⁵ Harris, *supra* note 2 at 35. This is reflected in a Québec Court of Appeal case: *Abitibi (Comté) c. Ibitiba Liée* 1993 WL 1435136 (CA Que.) at para 28, where the Court of Appeal applied a reasoning similar to Harris’ property-limitation rule in assessing the reasonableness of the limitations imposed by environmental laws on the right to land and the balancing act that was required between the competing property rights of land owners and greater societal, environmental goals with respect to which each land owner had to share some burden. In that case, the Court rejected the argument that the environmental regulation amounted to an expropriation of the property rights of the landowner: *ibid* at paras 28,29.

¹¹⁶ Harris, *supra* note 2 at 32-37.

¹¹⁷ Harris, *supra* note 2, at 90.

¹¹⁸ (1937) 58 C.L.R. 479 (Australia HC).

between two competing ownership rights and how one right acts or does not act as a limitation on the other.¹¹⁹

Whether we characterize a limitation – e.g., a limitation imposed by copyright on the usage privileges, in the copy of a copyright work – as “property-independent” or as a “property-limitation rule” is crucial. In the latter case, there is a prohibition on one of consumers’ *prima facie* open-ended privileges and powers that are at the essence of their ownership rights. In the former case, the prohibition is unrelated to the exercise by the consumer owners of their property freedoms. If one is to give weight to ownership and to the normative force of ownership freedoms, distinguishing the rights of owners from non-owners, one of the corollaries is that the property-limitation rules need to meet a special level of justification, process, and clarity that falls within the internal logic of the property institution and its limitations.¹²⁰

The third form of limitation refers to the most extreme manifestation of property limitation, namely when property can be confiscated from the owner, i.e., through the application of expropriation rules.¹²¹ As I will discuss in Chapter 7, expropriation rules are not as directly relevant when defining the limitations that copyright imposes on owners of commercial copies of copyright works and the limitations that copy ownership imposes on copyright.¹²²

Last but not least, Harris describes how practical and conceptual considerations impose limits on the scope of rights that property entails.¹²³ An interest that lacks a distance between the owner and the object of property is a conceptual limit to property.¹²⁴ Also, there are property externalities, which, for practical reasons, cannot fall under the purview of property. For example, it would be impractical to ban people from watching the beautiful garden of a private property, or to subject the pictures they take from the garden at a distance to the payment of a fee to the property owner. Some exclusive rights of

¹¹⁹ See the discussion on *Victoria Park* in Chapter 7 Part III B.

¹²⁰ Harris, *supra* note 2 at 90-91, summarizes how property-limitation rules are set as follows: “the values taken to be inherent in ownership are set against other values, individual or social ... freedom to act, self-seeking, in relation to that which is one’s own has served as a powerful normative lodestone.”

¹²¹ The confiscation of products of crime under criminal law, the powers of the trustee in bankruptcy in bankruptcy law, as well as division of patrimony under family law are various examples of expropriation rules. See Harris, *supra* note 2 at 37-38. “Appropriation rules” reflect the other side of the coin of expropriation and even beyond. For instance, in case where the owner cannot be located, which does not necessarily entail an instance of expropriation. *Ibid*, at 38-39.

¹²² See the discussion Chapter 7 Part II and Part III.

¹²³ Harris, *supra* note 2 at 332-361.

¹²⁴ *Ibid*, at 332-333.

copyright holders fall in that category.¹²⁵ Those rights are not far from the example of the photograph of the lawn.

Harris notes that there are, however, limits to how far the practicality argument can be invoked to impose limitations on *prima facie* open-ended powers and privileges related to property.¹²⁶ To invoke practical considerations to place limitations on property, e.g., major obstacles in the ability to enforce certain property interests, will not be justified in instances where there are strong justice reasons for supporting a property interest.¹²⁷ And yet, the practicality argument may point to deeper considerations of important normative value that can add support to the application of other property limitations, for instance, property-limitation rules.¹²⁸

Whether a property limitation is intended to benefit the public or a competing private interest is an important distinction in understanding how property limitations operate and how various competing interests are assessed against the other. While “property-independent prohibitions” tend to stem from public law and policy (for example, criminal law, road-safety law) property-limitation rules can either serve specific public domain interests (such as in the case of heritage conservation by-laws), private interests (such as the tort of nuisance between adjacent neighbours), or a hybrid of the two.¹²⁹ Whether the private property rights created by copyright benefit private or public interests heavily taints the ongoing debate around the scope of copyright holders’ exclusive rights, including the impact that these exclusive rights have on the public domain, the public interest, and fundamental rights such as freedom of expression.¹³⁰ The design of copyright as a whole may be said to serve both the immediate private interests of the copyright holder – predominantly so during the protection of the copyright work – while it is also concerned with broader public policy considerations.¹³¹ Similarly, the ownership rights in

¹²⁵ To illustrate that point, see *CCA*, *supra* note 1, ss 29 - 32.5 which contain very detailed enumerations of what are not considered infringements of copyright. As one example: the fact that it is permitted to take a picture of an architectural building, which under copyright laws is protected as a work of authorship see *CCA*, *ibid*, s. 32.2 (1) b. The inference is that were they not listed, all those acts could be considered as part of the exclusive rights of the copyright holder. See discussion in Chapter 5 Part II and Part III on the nature of copyright and particularly on the expansion of copyright and in Chapter 7 Part II on how copyright limitations operate on commercial copies of copyright works.

¹²⁶ Harris, *supra* note 2 at 334.

¹²⁷ *Ibid*.

¹²⁸ See the discussion on how copy ownership can limit the exclusive rights of copyright holders in Chapter 7 Part III.

¹²⁹ Harris, *supra* note 2 at 32-37.

¹³⁰ See the discussion on the balance objectives of the *CCA*, *supra* note 2 in Chapter 2 Part II and on the theoretical justifications of copy ownership and copyright in Chapter 6 Part III.

¹³¹ *Ibid*.

commercial copies of a copyright work may be said to benefit the private interests of consumers while also serving broader public interest goals.¹³² The distinction between the public and the private benefit of property limitations is helpful when characterizing the limitations that copyright imposes on copy ownership and vice versa.¹³³

The relationship between property limitations and the *numerus clausus* principle or standardization of property that I introduced above in this chapter requires some clarification.¹³⁴ Property limitations set limits on the *prima facie* open-ended powers and privileges of owners of a resource, while the standardization of property seeks to preserve the integrity of known forms of property interests by setting limits on the introduction of new forms of property interests.¹³⁵ Are the objectives of property limitations described by Harris in contradiction of the ones of the *numerus clausus* principle?

In my view, there is no conflict between the objectives and effects of property limitations and the standardization of property because they operate at different levels. First, except in the extreme case of expropriation rules, property limitations do not denature property interests, e.g., ownership of land. Rather, they set targeted limits on the open-ended powers and privileges of owners that, in some cases, may shift their location on the ownership spectrum.¹³⁶ What the principle of *numerus clausus* seeks to prevent is the creation of a new interest unknown to the property institution, e.g., an interest that would resemble ownership in all aspects but for a contractual restriction on the *prima facie* open-ended power to transfer the property interest to another party. Second, property limitations tend to be set by law (e.g., environmental or heritage conservation law) or judicial decisions (e.g., setting limits to the exercise of powers and privileges of ownership in property nuisance cases), while the limitations that the standardization of property seeks to forbid are set by private agreement.¹³⁷ Property limitations generally arise from a formal enactment or judicial pronouncement that ensures the level of transparency and uniformity that is precisely what the standardization of property seeks to promote. The *numerus clausus* principle allows courts to annul the effect of private clauses (e.g., restrictions on

¹³² *Ibid.*

¹³³ See the discussion in Chapter 7 Part II and Part III.

¹³⁴ See Part III of this chapter.

¹³⁵ *Ibid.*

¹³⁶ Property-limitation rules may have in some cases the effect of shifting the ownership on the ownership spectrum, away from “full-blooded ownership”, while property-independent prohibitions will not have this effect: the limits they set are not even part of the *prima facie* open-ended powers and privileges of property owners: see the discussion on property limitations in Part V of this chapter.

¹³⁷ See the discussion on the *numerus clausus* principle or the standardization of property in Part III of this chapter.

alienation of property) that denature known forms of property and impact the certainty and efficiency that surround similar property interests by increasing the information search costs to all.¹³⁸ For these two reasons, the objectives of property limitations are reconcilable with the objectives of the *numerus clausus* principle.

To sum up, property limitations are an integral part of Harris's theory of property and of the property framework that I apply to copyright and copy ownership. After discussing the nature and theoretical justifications of copyright and copy ownership in Chapter 5 and in Chapter 6, I will apply in Chapter 7 the theory of property limitations that I introduced in this Part to the limitations imposed by copyright on copy ownership, and explore the extent to which copy ownership acts (or should act) as a limitation to copyright from a legal and normative standpoint.¹³⁹

V. Conclusion

The property institution applies to myriad resources and human interactions.¹⁴⁰ Harris's theory emphasizes the distinctive features of the property institution, i.e., trespassory rules and the ownership spectrum, as well as the inclusion of property-limitation rules and expropriation rules.¹⁴¹ Ownership "as an organizing idea" emphasizes the common traits that ownership interests share on the *ownership spectrum* within the property institution.¹⁴²

Harris's detailed account of the main characteristics of the property institution, and, in particular, his theory of property limitations, provides a framework with which to analyze the interaction between copyright holders' exclusive rights and consumers' ownership rights in commercial copies of copyright works. I introduced the principle of *numerus clausus* or the standardization of property and how this principle will help further a deeper understanding of copyright and copy ownership, as well as provide a tool that addresses the tensions between property interests and the extent to which they can be altered by contract.¹⁴³

¹³⁸ *Ibid.*

¹³⁹ See the discussion in Chapter 7 Part II and Part III.

¹⁴⁰ Harris, *supra* note 2 at 4. See also Waldron, *supra* note 17 at 26ff; Mossman & Flanagan, *supra* note 17 at 2.

¹⁴¹ Harris, *supra* note 2 at 5, 34.

¹⁴² *Ibid.*, at 63-84.

¹⁴³ See the discussion in Part III of this chapter.

Harris's theoretical justifications of the property institution reflect a pluralistic approach that rejects a natural right to *full-blooded ownership* and that includes "the *prima facie* normative status of all ownership freedoms" and, to a lesser extent, "privacy, convention – dependent conceptions of labour-desert," as well as "pragmatic recognition of the wealth-creating potential of incentives and markets."¹⁴⁴ The theoretical justifications of property developed by Harris serve as the base from which to look into the theoretical justifications of copy ownership and copyright in Chapter 6.¹⁴⁵

The concepts that I introduced in this chapter will be applied throughout the Second Part of my thesis and, in particular, as I discuss the nature and justifications of copyright and copy ownership,¹⁴⁶ and how the theory of property limitations helps mediate between the competing property rights of copyright holders and consumers in the same object, i.e., the copyright work.¹⁴⁷ The concepts of property, ownership, and property limitations that I introduced here also play a central role in the Third Part of my thesis when I apply consumer protection law to commercial copies of copyright works.¹⁴⁸ I now begin with the application of the foundations of the property institution to define the nature of copyright.

¹⁴⁴ Harris, *supra* note 2 at 13.

¹⁴⁵ See Chapter 6 Part III.

¹⁴⁶ I discuss the nature of copyright in Chapter 5 and the nature and justifications of copy ownership in Chapter 6.

¹⁴⁷ See the discussion in Chapter 7, in particular in Part II and Part III.

¹⁴⁸ See Third Part: The Application of Consumer Law and Theory to Commercial Copies of Copyright Works (Chapter 8 to Chapter 11).

Chapter 5

The Nature of Copyright

I. Introduction

An inquiry into the nature of copyright is essential to understand the nature of commercial copies of copyright works and consumers' rights thereto. In the previous chapter, I introduced the theoretical framework of property and the key components that I apply in the Second Part of my thesis and beyond to define copyright consumers' rights. In this chapter, I apply the attributes of property to copyright to inform a more nuanced understanding of the nature of copyright that emphasizes its distinct character. I discuss the dangers of inflating the property attributes of copyright, as well as of vilifying any association of copyright with property.

In Part II, I look at how Canada's *Copyright Act* [CCA]¹ and case law inform us on the nature of copyright, with reference to other jurisdictions.² In particular, I look at how copyright's scope in the CCA has expanded since its creation. In Part III, I discuss the ongoing debate on the nature of copyright as a form of property and challenge the notion that associating copyright with property necessarily contributes to the expansion of copyright. I explain how the controversy about the nature of copyright is dependent on divergent conceptions of property. In Part IV, I look at the attributes of copyright and how they compare to other forms of tangible property through the application of property law and theory. I conclude in Part V by defining copyright as a limited form of property that includes a property interest in the embodiment of works (e.g., commercial copies of copyright works) and by reflecting on the insights that this characterization brings to the debate on the nature of copyright.

II. Copyright as defined in the CCA: a progressive expansion

The CCA does not define the nature of the exclusive rights conferred by copyright, unlike the legislation in other jurisdictions, such as the United Kingdom and France, where copyright is

¹ *Copyright Act*, RSC 1985, c. C-42.

² I.e., the US, EU, UK, and France.

specifically referred to as a property right.³ The *CCA* defines copyright, in relation to a work,⁴ as the sole right to produce or reproduce a work, to perform it in public, to publish it if unpublished, and other non-exhaustive exclusive rights, including the exclusive right to communicate the work to the public by telecommunication, and the sole right to authorize any such acts.⁵ Copyright also includes specific exclusive rights with respect to a performer's performance, sound recordings, and communication signals.⁶

In Canada and the other jurisdictions examined here, copyright has not ceased expanding during the last century in duration, in subject matter, and in scope. The *CCA* came into force in 1924.⁷ It provided that the duration of copyright was the life of the author plus 50 years (still the current term of copyright in Canada),⁸ which is a longer term than that which prevailed in earlier colonial copyright law.⁹ In 1924, "copyright" meant the sole right to produce or reproduce the work, to

³ U.K. *Copyright, Designs and Patents Act* 1988, c 48, [UKCDPA] s 1 (1) "Copyright is a property right which subsists in accordance with this Part in the following descriptions of work"; art L-111-1 CPI: "L'auteur d'une oeuvre de l'esprit jouit sur cette oeuvre, du seul fait de sa création, d'un droit de propriété incorporelle exclusif et opposable à tous." EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society*, [2001] OJ, L167/10, preamble, recital 9 provides that the harmonization goals of copyright law across the European member states are geared towards a high level of protection of copyright adding: "Intellectual property has therefore been recognized as an integral part of property." The *US Copyright Act*, 17 USC, does not define copyright as a property right but refers to copyright as "personal property", 17 USC §201 (d) (1) "The ownership of a copyright may [...] pass as personal property by the applicable laws of intestate succession.", and to ownership (see 17 USC, Chapter 2: Ownership and Transfer of Copyright).

⁴ *i.e.* an original work that falls under one of four categories: literary, dramatic, musical or artistic work: *CCA*, *supra* note 1, ss 2, 5.

⁵ *Ibid*, s 3.

⁶ *Ibid*, s 2 "copyright", ss 3,15,18,21,26.

⁷ *An Act to amend and consolidate the Law relating to Copyright*, SC 1921, c. 24 [*Copyright Act*, 1921]. For the history of Canadian copyright law, see: Harold G. Fox, *The Canadian Law of Copyright* (Toronto: The University of Toronto Press, 1944) at Chapter II: "Historical Introduction to the Law of Copyright".

⁸ *CCA*, *supra* note 1, s 6.

⁹ Under the *Copyright Law Amendment Act*, 1842, 5 & 6 Vict., c.45, the general rule for the duration of copyright (which applied only to "books" as defined) was the longer of the life of the author plus seven years or forty-two years. This *Act* was held to apply to all the British Dominions including colonies that had their own *Copyright Act* in *Routledge v Low* (1868) LO.R. 3 H.L. 100 (Judicial Committee of the Privy Council). The *Dominion Copyright Act*, 1875, 38 Vic. C. 88, was later embodied in the RSC 1886, C 2 and then carried forward in RSC 1906, C 70, s 4, which provided a term of copyright of 28 years from the time of registration of the copyright as prescribed by the Act, which could be extended for an additional 14 years in certain cases. See also *Durand & Cie v La Patrie Publishing Co.* (1960), [1960] S.C.R. 649 (SCC) at paras 15-20.

perform it in public, and to publish the work if it was unpublished.¹⁰ Copyright protected every original literary, dramatic, musical, and artistic work;¹¹ each but one of the four categories of works was defined by a non-exhaustive list of possible forms of works.¹²

Major reform of the *CCA* did not occur until more than 60 years later, in 1988,¹³ and included the explicit protection of computer programs as literary works, enhanced moral rights, the abolition of compulsory licences for the recording of musical works, and increased criminal sanctions for the infringement of copyright.¹⁴ Other amendments came into force the following year to ensure Canada's compliance with its obligations under the *Canada-United States Free Trade Agreement*,¹⁵ and included the addition of the exclusive right to communicate to the public by telecommunication.¹⁶ In 1993, the *CCA* was amended to clarify the definition of "musical work"¹⁷ and, in the same year, to introduce the exclusive right to authorize rental of computer programs, as well as to increase copyright holders' protection against the importation of infringing copyright works.¹⁸ The amendments were required for Canada to comply with its legal obligations under the *North American Free Trade Agreement*.¹⁹ In 1996, the *CCA* was amended so that Canada complied with its obligations under the *Agreement Establishing the World Trade Organization*.²⁰ The amendments introduced rights for performers against unauthorized recordings of live events and unauthorized live

¹⁰ *Copyright Act*, 1921, *supra* note 7, s 3(1).

¹¹ *Ibid*, s 4(1).

¹² *Ibid*, s 2 (b), (g), (n), (p). The definition of artistic work, dramatic work and literary work referred to a non-exhaustive list of forms of works while the definition of musical work referred to a specific form of work, i.e.: "any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced.": *ibid*, s 2(p).

¹³ *An Act to amend the Copyright Act and to amend other Acts in consequence thereof*, SC 1988, C15 [Copyright Amendment Act 1988].

¹⁴ *Ibid*.

¹⁵ *Canada-United States Free Trade Agreement*, January 1, 1989, online <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/us-eu.aspx?lang=eng&view=d>. The amendments to the *CCA*, *supra* note 1 were made pursuant to *An Act to implement the Free Trade Agreement between Canada and the United States of America*, SC 1988, c 65, ss. 61 to 65. Sections 61 to 65 came into force on February 13, 1989: SI/89-70.

¹⁶ *Ibid*, s 62. Prior to that, s 3(1)(f) of the *CCA*, *supra* note 1, referred to the exclusive right to communicate by radio communication (through the amendment brought on by the *Copyright Amendment Act, 1931*, SC 1931, c. 8, s. 3).

¹⁷ *An Act to amend the Copyright Act*, SC 1993, c. 23, s. 1. The amendment to the definition of "musical work" clarified that it covered both visual and audible representations of music.

¹⁸ *An Act to implement the North American Free Trade Agreement*, SC 1993, c. 44, s 55, 66.

¹⁹ *North American Free Trade Agreement*, December 17 1992, online : <http://www.nafta-sec-alena.org/en/view.aspx?x=343>.

²⁰ *Agreement Establishing the World Trade Organization*, Marrakesh, April 15, 1994, online: http://www.wto.org/english/docs_e/legal_e/legal_e.htm#finalact.

transmissions of their performances.²¹ Copyright was further expanded in 1997 as the *CCA* underwent significant amendments.²² They included the addition of exclusive rights for performers and producers of sound recordings, commonly referred to as “neighbouring rights,”²³ of the exclusive right to authorize rental of musical works,²⁴ of the private copying regime,²⁵ and of statutory damages for copyright infringement.²⁶ The *Criminal Code*²⁷ was amended in 2007 to make the unauthorized recording of films in movie theatres an indictable offence liable to imprisonment of up to five years.²⁸

Last but not least, after three previous failed attempts at legislative reform, the *CCA* was amended significantly in 2012²⁹ to comply with Canada’s international obligations under the *World Intellectual Property Organization Internet Treaties* of 1996 [*WIPO Internet Treaties*].³⁰ The amendments to the *CCA* included the exclusive right of copyright holders to control how their works are made available on the Internet,³¹ the extension of the term of protection of performers’ performance and sound recordings,³² and the introduction of provisions around technological protection measures [TPMs].³³ As I discussed in Chapter 3, the TPM provisions introduced separate acts of infringement for the

²¹ *An Act to implement the Agreement Establishing the World Trade Organization*, SC 1994, c. 47, ss 56-69, which came into force on January 1, 1996: SI/96-1.

²² *An Act to amend the Copyright Act*, SC 1997, C 24.

²³ *Ibid*, s 14.

²⁴ *Ibid*, s 3(3).

²⁵ *Ibid*, s 50. See the discussion on Canada’s private copying regime in Chapter 3 Part II B.

²⁶ *Ibid*, s 20.

²⁷ RSC 1985, c C-46.

²⁸ *An Act to amend the Criminal Code (unauthorized recording of a movie)*, SC 2007, c 28, which added s 432 to the *Criminal Code*, *supra* note 28.

²⁹ Before Bill C-11, *An Act to Amend the Copyright Act*, 1st Sess, 41th Parl, 2011 (assented to June 29, 2012) leading to the entry into force of the *Copyright Modernization Act*, S.C. 2012, c. 20 [CCMA], three previous bills were introduced to amend the *CCA*, *supra* note 1, to address the various issues brought on by the digital environment, i.e.: Bill C-32, *An Act to amend the Copyright Act*, 3rd Session, 40th Parl., 2010 (1st reading June 2, 2010); Bill C-61, *An Act to Amend the Copyright Act*, 2nd Sess, 39th Parl, 2008 (first reading 12 June 2008); Bill C-60, *An Act to Amend the Copyright Act*, 1st Sess, 38th Parl, 2005 (first reading 20 June 2005).

³⁰ *WIPO Copyright Treaty*, 20 December 1996, WO033EN, online:

http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P8_189 [WCT]; *WIPO Performances and Phonograms Treaty*, 20 December 1996, WO034EN, online:

http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html [WPPT]. The main purpose of the treaties is to

address “the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works.”: *WCT*, *Ibid*, preamble.

³¹ *CCA*, *supra* note 1, s 2.4 (1.1).

³² *Ibid*, s 23 (1), (1.1).

³³ *Ibid*, ss 41-41.21. I discuss the scope and issues around the newly introduced TPMs in Chapter 3 Part III B.

circumvention of TPMs put in place by copyright holders.³⁴ The 2012 amendments to the *CCA* also added new exceptions to copyright infringement.³⁵ In 2013, *Bill C-56*³⁶ was introduced and, if adopted, will strengthen the civil and criminal remedies in case of copyright infringement.³⁷

The *CCA*'s expansionism of copyright protection follows the same trend that is occurring at the international level and in the other jurisdictions examined here.³⁸ Since its adoption in 1886, the *Berne Convention for the Protection of Literary and Artistic Works* [*Berne Convention*]³⁹ has gone through many revisions to augment the protection of the exclusive rights of copyright holders.⁴⁰ Any subsequent international agreements adopted under the *Berne Convention*, such as the *WIPO Internet Treaties* of 1996⁴¹ must secure greater protection for copyright holders.⁴² The *Agreement on the Trade Related Aspects of Intellectual Property Law* [*TRIPS*]⁴³ which was signed upon the creation of the World Trade Organization [WTO], in 1994,⁴⁴ creates minimum standard obligations for the protection and enforcement of intellectual property rights, including copyright, for all the World Trade Organization members.⁴⁵ The *Berne Convention* and *TRIPS* have significant membership worldwide,

³⁴ *Ibid.*

³⁵ See the discussion in Chapter 3 Part II D.

³⁶ *Bill C-56, An Act to amend the Copyright Act and the Trade-marks Act and to make consequential amendments to other Acts*, 1st Session, 41st Parl, 2013, (first reading, March 1, 2013).

³⁷ *Ibid.*, cl. 3-5.

³⁸ I.e. the US, the EU, the UK and France. On the progressive expansion of copyright historically and globally see: David Vaver, "Intellectual property: still a "bargain"?" (2012) 34 E.I.P.R. 579 at 582ff.

³⁹ *Berne Convention for the Protection of Literary and Artistic Works*, 828 U.N.T.S. 221, September 9, 1886.

⁴⁰ Revisions were made in 1908 (in Berlin) in 1928 (Rome), in 1948 (Brussels), in 1967 (Stockholm) and in 1971 (Paris). Other amendments were made in 1979: World Intellectual Property Organization, *Berne Convention for the Protection of Literary and Artistic Works*, online:

http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html. See also Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights, The Berne Convention and Beyond*, 2e ed. (Oxford: Oxford University Press, 2006), vol. 1, Chapter 3 "The Subsequent Development of the Berne Convention 1886-1971".

⁴¹ *Supra* note 30.

⁴² *Berne Convention*, *supra* note 39, art 20 provides: "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention [...]"

⁴³ *Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C*, Apr. 15, 1994, 1869 U.N.T.S. 29, 33 I.L.M. 1197 (1994) [*TRIPS*].

⁴⁴ *Agreement Establishing the World Trade Organization*, *supra* note 20.

⁴⁵ *TRIPS*, *supra* note 43, Part II, 1, Part III.

including Canada, the US, the EU,⁴⁶ the UK, and France.⁴⁷ The signature of the *Anti-Counterfeiting Trade Agreement* in 2011 [ACTA],⁴⁸ including by Canada, illustrates a new wave of regulation toward strengthening the means by which copyright holders can enforce their exclusive rights and deter copyright infringement.⁴⁹ In Canada and worldwide, the trend, as intensified in the last decades, has been toward the progressive expansion of copyright in duration, in subject matter, and in scope.

At first sight, the construction of copyright by the CCA exhibits characteristics that are commonly associated with property.⁵⁰ The exclusionary powers that the CCA confers on copyright holders in relation to a work can be assigned in whole or in part, licensed, donated, or bequeathed as an object of commodification.⁵¹ Copyright holders exclusive rights are opposable to all,⁵² and, when infringed, entitle copyright holders to all civil remedies by way of injunction, damages, accounts, delivery up, and otherwise that may be conferred by law.⁵³ Copyright infringement can also give rise to criminal sanctions.⁵⁴

The Supreme Court has on numerous occasions distanced copyright law from property law, referring to *Compo Co. v Blue Crest Music Inc.*⁵⁵ where Estey J. stated in a unanimous judgment:

⁴⁶ The European Union is a member of the World Trade Organization, hence a contracting party of *TRIPS*, *supra* note 43: WTO Membership, online: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. It is not a contracting party of the *Berne Convention*, *supra* note 39: Berne Convention for the Protection of Literary and Artistic Works, Contracting Parties, online: http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15.

⁴⁷ As of January 18 2013, there were 157 contracting parties to the *Berne Convention*, *supra* note 52: World Intellectual Property Organization, Berne Convention for the Protection of Literary and Artistic Works, Contracting Parties, online: http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 and 157 members to the World Trade Organization, hence contracting parties to *TRIPS*, *supra* note 56 (latest information available on the WTO website: August 24, 2012): World Trade Organization, WTO Membership, online: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

⁴⁸ October 1, 2011, online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/intellect_property.aspx?view=d ACTA's signatory members include Canada, the EU and its member states, the US, Japan and Australia.

⁴⁹ *Ibid.* See the discussion on ACTA and related national laws in Chapter 1, Part II.

⁵⁰ See the discussion in Chapter 4 in particular Part II, on the concept of property and ownership.

⁵¹ CCA, *supra* note 1 s 13(4)-13(7); see Fiona MacMillan, "Copyright and Corporate Power", in Ruth Towse (ed), *Copyright and the Cultural Industries* (Cheltenham: Edward Elgar, 2002) 99-118; Fiona MacMillan, "The Cruel C: Copyright and Film" (2002) 24 E.I.P.R. 483, in particular at 484.

⁵² CCA, *supra* note 1, s 27 (1): "It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do."

⁵³ CCA, *supra* note 1, s 34(1).

⁵⁴ *Ibid.* ss 42-43.

⁵⁵ *Compo Co. v Blue Crest Music Inc.* (1979), [1980] 1 S.C.R. 357 (SCC).

copyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute.⁵⁶

And yet, property and ownership parlance is commonly used to describe copyright in judicial decisions, including by the Supreme Court.⁵⁷ In my view and for reasons I will elaborate below in this chapter, the characterization of copyright in *Compo Co. v Blue Crest Music Inc.* emphasizes its statutory fabrication more than it forecloses any possible association between copyright and property.⁵⁸

In Canada and worldwide, copyright has expanded in duration, scope, and subject matter. While the *CCA* does not specifically define the nature of copyright, it contains at first glance many of the key attributes that are normally associated with property. In the remainder of this chapter, I will examine the essential characteristics of copyright through the lens of the property law and theory framework that I introduced in Chapter 4, court decisions, and copyright scholarship. I will begin my analysis with an overview of the animated debate among copyright commentators on the characterization of copyright as property.

⁵⁶ *Ibid*, at para 23 (subsequently applied in numerous Supreme Court Judgements: see *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers* [2004] 2 S.C.R. 427 at para 82, whereby the Court lists previous judgments by the Supreme Court having made the same statement.

⁵⁷ See for example: *Desputeaux v Éditions Chouette (1987) inc.*, 2003 SCC 17 at para 57: “the *Copyright Act* deals with copyright primarily as a system designed to organize the economic management of intellectual property, and regards copyright primarily as a mechanism for protecting and transmitting the economic values associated with this type of property and with the use of it.” See also *Euro-Excellence Inc. v Kraft Canada Inc.*, 2007 SCC 37 at paras 27-39; *BMG Canada v John Doe*, 2005 FCA 193 at para 41. *Cie Générale des établissements Michelin v C.A.W.- Canada* (1996) 71 C.P.R. (3d) 348 (F.C.T.D.).

⁵⁸ *Supra* note 55. See the discussion further below in Part IV of this chapter.

III. The ongoing debate: is copyright property?

Copyright has been described as a monopoly,⁵⁹ as a regulatory right or privilege,⁶⁰ as a construction of statute,⁶¹ as an intellectual right,⁶² as a government subsidy,⁶³ as property,⁶⁴ and as akin to a dismemberment of ownership (i.e., usufruct).⁶⁵ While copyright shares important attributes with other forms of property,⁶⁶ there is an ongoing debate on the nature of copyright and other intellectual

⁵⁹ R.J. Roberts, "Canadian Copyright: Natural Property or Mere Monopoly" (1979) 40 Can. Patent Reporter (2d) 33; Pierre-Emmanuel Moyse, "La nature du droit d'auteur: droit de propriété ou monopole?" (1998) 43 McGill L.J. 507.

⁶⁰ L. Ray Patterson, "Free Speech, Copyright and Fair Use" (1987) 40 Vand. L. Rev. 1 at 8; William Patry, *Moral Panics and the Copyright Wars* (Oxford University Press, 2009) at 110: historically, copyright in the U.S. was always regarded as a regulatory privilege, not as a property right; Mikhail Xifaras, *La Propriété Etude de philosophie du droit* (Paris: Presses Universitaires de France, 2004) at 411 and 425 describes copyright as a privilege.

⁶¹ *Compo Co. v Blue Crest Music Inc.*, *supra* note 55 at para 23; see also *supra* note 56.

⁶² Séverine Dusollier, *Droit d'auteur et protection des oeuvres dans l'univers numérique*, 2d ed. (Bruxelles: Larcier, 2007) [Dusollier 2007] at 322-323 where the author defines the nature of copyright (as well as other intellectual property rights) as a limited right of exploitation to the public that does not involve the use or enjoyment of a resource which contrasts it with property.

⁶³ Mark A. Lemley, "Property, Intellectual Property and Free Riding" (2005) Texas L. Rev. 1031 at 1069ff, the author, after making an analogy to real property, tort, government subsidy and government regulation, concludes that no analogy is fully adequate but the closest one is probably a government subsidy as it underlies the trade-off at play better than talking about it as a real property right.

⁶⁴ See *supra* note 57. For a historical perspective on the debate around the nature of copyright, i.e. either as a monopoly, property or creation of statute, see Fox, *supra* note 7 at 7-11, whereby after reviewing the three characterizations of copyright, the author concludes that copyright is incorporeal property: *ibid*, at 10-11; James W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996) at 42-47; David Vaver, "Canada's Intellectual Property Framework: A Comparative Overview" (2004) 17 I.P.J. 125 at 135; R. Hughes, S. Peacock & N. Armstrong, *Hughes on Copyright & Industrial Design*, 2d ed., loose-leaf (Toronto: LexisNexis Canada, 2005) at 101 where the authors refer to copyright as intangible incorporeal property; see Dusollier 2007, *supra* note 62 at 314- 323 who reviews doctrinal works qualifying copyright as property and the various arguments for and against the qualification of copyright as property; Peter S. Menell, "The Property Rights Movement's Embrace of Intellectual Property: True Love Or Doomed Relationship?" (2007) 34 Ecology L.Q. 713 at 721; Richard A. Epstein, "Liberty versus Property? Cracks in the Foundations of Copyright Law" (2005) 42 San Diego Law Review, 1 [Epstein, "Liberty versus Property"]; Adam Mossoff, "Is copyright property?" (2005) 42 San Diego Law Review, 29; Richard A. Epstein, "The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary" (2010) 62 Stan. L. Re. 455 [Epstein, "Disintegration of Intellectual property"].

⁶⁵ David Lametti "The Concept and Conceptions of Intellectual Property as seen through the lens of Property", in G. Comandé & G. Ponzanelli, eds, *Scienza e Diritto nel Prisma del Diritto Comparato* (Torino: Giappichelli, 2004) 269 at 282, where the author finds some commonality between copyright and one of the dismemberment of ownership, i.e. usufruct, acknowledging that copyright in the end still shares the attributes of a property right.

⁶⁶ Copyright can be assigned in whole or in part, licensed, donated or bequeathed, and copyright is opposable to all: see the discussion in Part IV of this chapter.

property rights, and more particularly around the effects of assimilating copyright to property.⁶⁷ I will deal with the debate on the property attributes of copyright at a substantive level below in this chapter.⁶⁸ At this point, I will limit my remarks to the political dimension of associating copyright with property in contemporary copyright discourse.

Commentators, including Lawrence Lessig and William Patry, describe how the assimilation of copyright to private property generally serves the proponents of strong copyright holders' rights.⁶⁹ The analogies and metaphors employed by Jack Valenti, as president of the Motion Picture Association of America, equating cultural property to the strongest forms of private property (and the need to give the former the same level of protection as the latter) are frequently cited examples of the use of strong tangible property rhetoric to secure more robust intellectual property rights.⁷⁰ Lingo that is traditionally associated to tangible property, e.g., fencing-off, theft, and piracy is frequently used with respect to intellectual property and carries with it a powerful imagery that for some may have contributed to the progressive expansion of the scope of copyright.⁷¹

Commentators who favour a robust public domain and the need to give greater consideration to copyright users and other competing interests, warn against the dangers of the *propertization* of copyright.⁷² It is not always clear that warnings against associating copyright with property necessarily reject that copyright can be a form of property.⁷³ While commentators who point to the perils of equating copyright with other forms of tangible property will sometimes concede that

⁶⁷ Epstein, "Liberty versus Property", *supra* note 64; Mossoff, *supra* note 64; Hanoch Dagan, "Property and The Public Domain" (2006) 18 Yale J.L. & Human. 84; Dusollier 2007, *supra* note 62 at 309-328; Michael Spence, *Intellectual Property* (Oxford: OUP, 2007) at 13-15; Menell, *supra* note 64; Patry, *supra* note 60 at 109-131.

⁶⁸ See the discussion on the property attributes of copyright in Part IV of this chapter.

⁶⁹ Lawrence Lessig, *Free culture: How big media uses technology and the law to lock down culture and control creativity* (New York: Penguin Press, 2004) at 116ff.; Patry, *supra* note 60 at 109-132.

⁷⁰ Lessig, *supra* note 69 at 116ff.; Patry, *supra* note 60 at 109ff.

⁷¹ *Ibid.* Neil Weinstock Netanel, *Copyright's Paradox* (New York: Oxford University Press, 2008) at 6-8. On the progressive expansion of copyright, see the discussion in Part II of this chapter.

⁷² Patry, *supra* note 60 at 114. see also Carys Craig, "Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law" (2002) 28 Queen's L.J. 1 [Craig 2002], in particular at 58 where the author describes the effects of the Lockean reasoning to defend copyright, starting with the author's entitlements, and working backwards to set its limits as opposed to starting the analysis with the public domain and then justifying authors' right to control in terms of encouragement to create.

⁷³ For example, Lawrence Lessig, *The Future of Ideas* (New York: Random House, 2001) at 6 does not question property *per se* as much as the need to rethink property; see also Lessig, *supra* note 69 at 172.

different conceptions of property can lead to different conceptions of the scope of copyright,⁷⁴ they generally view the association of copyright with property as a dangerous slippery slope that is contributing to the progressive expansion of copyright holders' exclusive rights.⁷⁵ Because of the uncertain contours of intellectual property and copyright, the application of property reasoning to such abstract concepts or intangibles may present even greater danger of expansion than in relation to other forms of tangible property.⁷⁶

The recent Supreme Court jurisprudence that signals a move away from an absolutist view of copyright holders' rights reflects concerns similar to the discourse against the *propertization* of copyright.⁷⁷ While initially not explicitly associating a more absolutist view of copyright with its *propertization*,⁷⁸ the Court in a unanimous judgment recently made a clearer link between the two when it reflected on the recent evolution of its jurisprudence in *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* [Bell Canada]:⁷⁹

Théberge reflected a move away from an earlier, author-centric view which focused on the exclusive right of authors and copyright owners to control how their works were used in the marketplace: see e.g. *Bishop v Stevens*, [1990] 2 S.C.R. 467, at pp. 478-79. Under this former framework, any benefit the public might derive from the copyright system was only "a fortunate by-product of private entitlement" [citing Carys J. Craig, "Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law" (2002), 28 *Queen's L.J.* 1, at pp 14-15].⁸⁰

⁷⁴ For example, see Craig 2002, *supra* note 72 at 13, 40-41.

⁷⁵ Craig 2002, *supra* note 72, where the author warns against the detrimental effects on the copyright system of a pervasive Lockean rights-based view of property applied to copyright in copyright case law, that focuses on the relationship between the author and her work as opposed to centering on the relationship between the work and the public and the incentive-based system that needs to be put in place to encourage the creation and dissemination of works; Patry, *supra* note 60 at 114.

⁷⁶ See the discussion below in Part III of this chapter on *Cie Générale des établissements Michelin v C.A.W.- Canada* (1996), 71 C.P.R. (3d) 348 (F.C.T.D.); see also Craig 2002, *supra* note 72 at 40-41.

⁷⁷ See the discussion on the objectives of the *CCA*, *supra* note 1 to balance competing interests in Chapter 2 Part II.

⁷⁸ *Ibid.* In *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 [CCH] at para 23 the Court took into consideration the need to preserve a robust public domain in defining what the proper test was to determine "original works" that give rise to copyright protection [citing Jessica Litman, "The Public Domain" (1990), 39 *Emory L.J.* 965, at 969, and Carys J. Craig, "Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law" (2002), 28 *Queen's L.J.* 1.].

⁷⁹ 2012 SCC 36.

⁸⁰ *Ibid.*, at para 9.

The *move away* from a focus on the exclusive right of authors as described by the Court set the base for its reiteration that fair dealing is a users' rights that required a generous interpretation of its purposes.⁸¹

In response to warnings against the effects of the propertization of copyright, other commentators attribute the so-called expansionist effects of qualifying copyright as property and the polarization it creates between copyright absolutists and copyright minimalists to a misconception of property.⁸² Rather than a monolith of unlimited exclusionary powers, property is a heterogeneous legal institution that is intrinsically subject to limitations and obligations.⁸³ The property institution(s) can serve the interests of defenders of the public domain as much as it does the interests of the copyright holders. In that view, the proponents of a strong public domain even stand a better chance at constraining copyright expansionist arguments inside the property institution itself, rather than by invoking less defined concepts external to it.⁸⁴

The persistence with which some commentators insist that copyright is not property serves, at times, the overt purpose of distancing copyright from a natural property right.⁸⁵ This motive, it seems, confuses the nature of property with how it is sometimes justified, e.g., as a natural right, which is not a *sine qua non* condition for the existence of property.⁸⁶ Commentators who guard against the characterization of copyright as property confront a specific view of property, including a right-based view of property that opposes any form of regulation or interference with property, and as a powerful

⁸¹ *Bell Canada*, *supra* note 79 at paras 11-50, in particular at paras 27-29 where the Supreme Court reaffirmed the principles enunciated in *CCH*, *supra* note 78, on fair dealing. See also the discussion on fair dealing in Chapter 3 Part II C.

⁸² Dagan, *supra* note 67 at 86; Christopher M. Newman, "Transformation in Property and Copyright" (2011) 56 Villanova Law Review 251; Eduardo Moise Penalver & Sonia K. Katyal, *Property outlaws* (New Haven: Yale University Press, 2010) at 43.

⁸³ *Ibid.* See also the discussion in Chapter 4, in particular Part II and V. Lessig, *supra* note 69 at 72 also shares the view that copyright is property; however he emphasizes how we need to take into account the balancing of competing interests that are at stake and define its scope accordingly.

⁸⁴ Dagan, *supra* note 67 at 92; Newman, *supra* note 82 at 78; see also David Fagundes, "Property Rhetoric and the Public Domain" (2010) 94 Minn. L. Rev. 652 at 705.

⁸⁵ Roberts, *supra* note 59 at 34, Patterson, *supra* note 60 at 8. Other commentators have raised the reticence of qualifying copyright as property for political reasons including fear of the feudalist implications that the association of intellectual work protected by copyright with property may lead to: see Xifaras, *supra* note 60 at 414. See also Patry, *supra* note 60 at 112ff.

⁸⁶ Even though the existence of a natural right to property is the object of an ongoing debate, in an Anglo-American context, instrumentalism, and in particular utilitarianism, is often viewed as the most influential justification for the existence of private property, including intellectual property: see the discussion on the theoretical justifications of copy ownership and copyright in Chapter 6 Part III.

right that precedes the state.⁸⁷ At other times, the underlying purpose of distancing the nature of copyright from property is to avoid the perceived absolutism and expansionist effects associated with the *prima facie* open-ended privileges and powers of property.⁸⁸

A striking example of the perils of interpreting the scope of copyright by using the analogy of strong tangible private property rights is the judgment in *Cie Générale des établissements Michelin v C.A.W.- Canada [Michelin]*.⁸⁹ The plaintiff Michelin sought an injunction against defendants CAW Union and others (CAW Union) based on trademark and copyright infringement for the use of the Bibendum (Michelin man) logo owned by Michelin. In an attempt to unionize the employees of Michelin Canada, CAW Union distributed various leaflets depicting the Bibendum logo in humorous or satirical ways. CAW Union was not successful in arguing that its use of the Bibendum logo was permissible as a parody or satire. Until the amendments to the *CCA* in 2012,⁹⁰ the *CCA* did not provide an exception to copyright infringement based on parody or satire as was already the case in other jurisdictions.⁹¹

One of CAW Union's defences in *Michelin* was based on the *Canadian Charter of Rights and Freedoms (Charter)*,⁹² arguing that their posters and leaflets depicting the Bibendum logo were forms of expression protected by section 2(b) of the *Charter* and that the *CCA* was unconstitutional to the extent that it forbade such use.⁹³ Teitelbaum, J. for the Federal Court (trial division) rejected that argument: "The *Charter* does not confer the right to use private property – the Plaintiff's copyright –

⁸⁷ Netanel, *supra* note 7 at 6-8; Patry, *supra* note 60 at 97-132. see Craig 2002, *supra* note 72.

⁸⁸ For example see Netanel, *supra* note 71 at 6-8; Patry, *supra* note 60 at 114; see also Craig 2002, *supra* note 72, guarding against the expansionist effects of a Lockean rights-based view of copyright.

⁸⁹ *Supra* note 76, in particular at para 84, where the court referred to plaintiffs Michelin's copyright in the bibendum logo as private property, responding to an argument by defendants that copyright had to be analogized to a form of public property. For a discussion of this case see: Jane Bailey, "Deflating the Michelin Man: Protecting Users' Rights in the Canadian Copyright Reform Process" in Michael Geist, ed. *In the Public Interest: The Future of Canadian Copyright Law*, (Toronto: Irwin Law, 2005) 125; see also Carys Craig, "Putting the Community in Communication: Dissolving the Conflict between Freedom of Expression and Copyright" (2006) 56 U. Toronto L.J. 75 [Craig 2006].

⁹⁰ *CCMA*, *supra* note 29.

⁹¹ *Ibid*, s 21 amended s 29 of the *CCA*, *supra* note 1, by adding parody or satire as one of the purposes under which the fair dealing exception to copyright infringement applies. In France, see art L122-5 4° CPI; in the US, parody can be invoked as an exception to copyright infringement and is assessed under the fair use doctrine (17 USC §107): *Campbell v Acuff-Rose Music, Inc.* 510 U.S. 569 (1994).

⁹² Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.

⁹³ *Michelin*, *supra* note 76 at paras 82-86. For a discussion of this judgment and on the interaction between copyright and freedom of expression, see Craig 2006, *supra* note 89.

in the service of freedom of expression.”⁹⁴ It granted injunction relief to Michelin, ordering CAW Union to stop using the Bibendum logo on its leaflets.

Through out its reasons for judgment in *Michelin*, the Court emphasized the private property nature of copyright and relied on case law that stated that the exercise of freedom of expression did not give the right to use someone else’s private property.⁹⁵ Even if the Court acknowledged that the use of the copyright (private property) of Michelin was different from the use of private property as the location for the exercise of the freedom of expression, it nevertheless held that an analogy could be made between the two to ultimately conclude that the use of private property was a prohibited form of expression under the *Charter*.⁹⁶

By analogizing the reproduction of the *Bibendum*, a work protected by copyright and as a trademark, to the use of tangible private property, the Court failed to recognize important differences between the nature of copyright and the nature of ownership rights in tangible property, such as land or equipment. Among the differences, reproduction of the Bibendum was non-rivalrous, i.e., it did not deprive Michelin of the enjoyment of its property, nor was there any intrusion involved. The use of the Bibendum was not one that competed with the economic rights of Michelin’s copyright work, which could have supported a form of “deprivation of enjoyment” by Michelin under a tangible private property law analysis.⁹⁷ The reproduction by the defendants of Michelin’s copyright work and trademark calls for a different rationale than the one that withstands the balancing act at play in cases involving the use of other forms of private property to exercise freedom of expression. The Court was concerned to offer copyright holders less protection than other “full property owners” on the basis that they held an intangible right.⁹⁸ The Court likely implied the full strongest form of exclusionary

⁹⁴ *Michelin*, *supra* note 76 at para 85.

⁹⁵ *Ibid* at paras 94-118. The Court referred mainly to three judgments: *Committee for the Commonwealth of Canada v Canada* (1991), 77 D.L.R. (4th) 385 (S.C.C.), *Harrison v Carswell*, (1975), 62 D.L.R. (3d) 68, and *New Brunswick Broadcasting Co. Ltd. v CRTC*, [1984] 2 F.C. 410.

⁹⁶ *Michelin*, *supra* note 76 at para 107: “The Defendants have used private property not as a forum but as a means of conveying a message. However, despite these differences, I reason by analogy to *Commonwealth* that I am permitted to consider the parties’ interests even before the Section 1 stage of the analysis in order to examine the scope of the Defendants’ freedom of expression under Section 2(b) and determine if the expression is in a prohibited form. I hold that it is reasonable to equate doing something on private property as a forum for expression with using the property - the copyright - to convey expression.”

⁹⁷ The effect of the use on the work protected by copyright, e.g. its commercial exploitation is also one of the criteria to consider to determine whether the dealing of the work is fair or not: see *CCH*, *supra* note 78 at para 59. See also the discussion on fair dealing in Chapter 3 Part II C.

⁹⁸ *Michelin*, *supra* note 76 at para 109: “Copyright is an intangible property right. The owner therefore has a more challenging task in asserting his or her control over the use of the property. Launching an action for

powers that can be conferred on property owners, i.e., those invested with “full-blooded ownership.”⁹⁹ It is as if the private property nature of copyright did not give the court the choice to treat copyright differently.

Although the open-ended texture of property can lead to expansionism,¹⁰⁰ this is not necessarily an account of what property is. Property is not absolute: it is the object of various forms of limitations.¹⁰¹ The property institution regulates a multitude of heteroclitic relationships and resources, both tangible and intangible.¹⁰² The unqualified equation of copyright with private tangible property in *Michelin* reflects an absolutist and monolithic approach to property as opposed to a contextual approach looking in each case at the justifications or “property-specific justice reasons”¹⁰³ that withstand the property right in question. Copyright’s objectives embed the promotion of freedom of expression and other democratic values.¹⁰⁴ Exceptions to copyright infringement allow the mediation between copyright holders’ exclusive rights and those fundamental rights when they come in conflict.¹⁰⁵ The *CCA* limitations on copyright holders’ exclusive rights allow for the resolution of conflicts between competing interests and, in the case of *Michelin*, in a way that is even more apparent now than it was at the time.¹⁰⁶ Without getting into the actual merit of CAW Union’s defence under the *Charter* and

infringement under the aegis of the *Copyright Act* is the owner’s prime tool for asserting his or her rights. But just because the right is intangible, it should not be any less worthy of protection as a full property right: (see *Ladbroke (Football) Ltd. v William Hill (Football) Ltd.*, [1964] 1 W.L.R. 273 (H.L.) at 291).”

⁹⁹ In Harris’ terms, the strongest form of ownership interest on the ownership spectrum: Harris, *supra* note 64 at 5, 30; see also the discussion on the concept of property and ownership in Chapter 4 Part II.

¹⁰⁰ Different theoretical justifications of property can have an impact on a more expansive or restrictive view of property. I discuss the various theoretical justifications of (intellectual) property and their effect on the scope of copyright and copy ownership in Chapter 6 Part III.

¹⁰¹ For a discussion on the operation of various forms of property limitations, see Chapter 4 Part V.

¹⁰² Harris, *supra* note 64 at 4 and at 348 where the author notes: “It is a mistake to assume that either we must align property in information with property in other resources or else we must exclude information from the property agenda. Property-institutional design may be and should be much more flexible than these alternatives allow.”; Mossoff, *supra* note 64 at 40-41; Newman, *supra* note 82 at 79: “The problems addressed by ownership of tangible things are not identical in all respects to those that underlie ownership of intellectual works, and careless property-based rhetoric can lead to error. But the areas of commonality are great, and we should not be too quick to conclude that property is always the problem and never the solution.”; see also: Richard A. Epstein, “What is So Special about Intangible Property? The Case for Intelligent Carryovers” (2010), New York University Law and Economics Working Papers, Paper 243, online: http://lsr.nellco.org/nyu_lewp/243.

¹⁰³ These are the reasons that can be invoked to justify a property institution: Harris, *supra* note 64 at 168.

¹⁰⁴ For a discussion on the theoretical justifications of copyright and copy ownership, see Chapter 6 Part 3.

¹⁰⁵ This is the case in particular with respect to the application of fair dealing: see the discussion in Chapter 3 Part II C and in Part IV.

¹⁰⁶ I.e. Parody or satire, which could have been invoked in that case, was not a listed purpose under the fair dealing exceptions to copyright infringement, but the 2012 amendments to the *CCA*, *supra* note 1 added parody or satire as a listed purpose: *CCA*, *ibid* s 29.

the tests it had to fulfill to be successful, *Michelin* illustrates the pitfalls of a monolithic absolutist property approach to copyright, and gives cause for concern.

To distance the nature of copyright from property is no guaranteed panacea against the expansionist tendencies of copyright that we have witnessed in recent years. The declared self-standing statutory nature of copyright¹⁰⁷ has not stopped it from expanding, independently of equating copyright to property.¹⁰⁸ In respect of the trespassory powers and economic benefits that are presumed to be within the domain of copyright holders, copyright is often described as conferring inflated rights on copyright holders, compared to other property rights. Applying economic theory, Mark A. Lemley observes that copyright law allows copyright holders to benefit from positive externalities of their ownership rights to a degree that is not observed for other types of tangible property:¹⁰⁹

...society in general doesn't prohibit free riding. Internalization of positive externalities is not necessary at all unless efficient use of the property requires a significant investment that cannot be recouped another way. And even then, economic theory properly requires not the complete internalization of positive externalities but only the capture of returns sufficient to recoup the investment. Only where there is a tragedy of the commons do we insist on complete or relatively complete internalization of externalities.¹¹⁰

This is the result, according to Lemley, of a focus by the courts on the benefit of those externalities, i.e., "free riding," and on the assumption that such benefits are necessarily unjust.¹¹¹ In *Euro-Excellence Inc. v Kraft Canada Inc.*,¹¹² Bastarache J. in his dissenting reasons applied a similar

¹⁰⁷ *Compo Co. v Blue Crest Music Inc.* *supra* note 55 at para 23. See also *supra* note 56.

¹⁰⁸ See the discussion on the progressive expansion of copyright in the *CCA*, *supra* note 1 and worldwide in Part II of this chapter. See also the discussion of copyright expansionism further below in Part III of this Chapter.

¹⁰⁹ Lemley, *supra* note 63 at 1033: "Courts and commentators adopt--explicitly or implicitly--the economic logic of real property in the context of intellectual property cases. They then make a subconscious move, one that the economic theory of property does not justify: they jump from the idea that intellectual property is property to the idea that the IP owner is entitled to capture the full social value of her right."

¹¹⁰ Lemley, *supra* note 63 at 1050. See also Menell, *supra* note 64 at 744-745, where the author notes that one of the important differences between intellectual property and tangible property is precisely that there is no tragedy of the commons and hence no need that every component of the artificially created resource scarcity should necessarily be owned.

¹¹¹ Lemley, *supra* note 63 at 1044.

¹¹² *Supra* note 57 at para 85.

reasoning when he emphasized that the *CCA* does not protect all “positive externalities” of a copyright work but “only the legitimate economic interests of copyright holders.”¹¹³

One can think of many examples in the *CCA* that illustrate Lemley’s analysis of copyright as capturing a large number of positive externalities.¹¹⁴ Increasingly, the legitimacy of the corner stone of copyright law, i.e., the exclusive right to reproduce copies of copyright works, needs to be reconsidered in the digital environment. Certain copies are not likely to threaten the creator-incentive primary justification of copyright,¹¹⁵ for instance, when a consumer makes copies purely for convenience purposes. With the amendments in 2012, the *CCA* now allows users to make copies for private purposes under limited circumstances without copyright holders’ consent and without the need to compensate copyright holders.¹¹⁶ The introduction of a limited reproduction right for private purposes in the *CCA* shows some recognition that reproductions for private purposes do not unreasonably interfere, if at all, with copyright holders’ exclusive rights.¹¹⁷ A more controversial example is when the owners of commercial copies of copyright works make copies for family members or close friends. It is not always clear that the additional copies would be competing with the exclusive economic rights of copyright holders. In other words, even had the family members or close friends not been provided with the copy, they may not have purchased the copy of the copyright work at all. Making copies for family members or close friends can enhance other goals of copyright and could even benefit copyright holders, for example, by encouraging the beneficiaries of the burned copies to go to a concert or to buy the complete CDs or download other songs from the same musicians.¹¹⁸ Nevertheless, in most cases, the rights and remedies that generally support the exclusive

¹¹³ *Ibid*, Bastarache J. proposing a narrower interpretation of *CCA*, *supra* note 1 s 27(2), by seeking to define what were the legitimate economic interests of the copyright holder in the case at hand: “Section 27(2) of the Act is meant to prohibit secondary infringement resulting from the wrongful appropriation of the gains of another’s skill and judgment by way of the acts enumerated in paras. (a) to (c). Conversely, other economic interests – although they may seem to be closely associated with the interests legitimately protected as emanating from that skill and judgment – are not protected. In particular, if a work of skill and judgment (such as a logo) is attached to some other consumer good (such as a chocolate bar), the economic gains associated with the sale of the consumer good must not be mistakenly viewed as the legitimate economic interests of the copyright holder of the logo that are protected by the law of copyright.”

¹¹⁴ Lemley, *supra* note 63.

¹¹⁵ I discuss the theoretical justifications of copyright and copy ownership in Chapter 6 Part III.

¹¹⁶ See the discussion on the private purpose right in Chapter 3 Part II D (ii).

¹¹⁷ *Ibid*.

¹¹⁸ See generally Jessica Litman, “Lawful Personal Use” (2007) 85 Tex. L. Rev. 1871, in particular at 1881 and also at 1911-1912, where the author develops parameters to help define what the scope of lawful personal use should be in US copyright law, based on whether the use in question enhances what the author describes as “copyright liberties” and the extent to which the use would undermine the incentive to create.

right to reproduce, lead to the inference that something is being taken away from copyright holders because someone made additional copies of the work without authorization or compensation.¹¹⁹

There are several other illustrations of copyright holders' ability to capture the positive externalities of their ownership rights even above and beyond what tangible property would allow. The narrow application that courts have given to the non-substantial-part doctrine to allow uses of copyright works without copyright holders' authorization is one example.¹²⁰ Another example is the "incidental inclusion" provision in the *CCA*.¹²¹ It provides a limited exception to the inclusion of a work (e.g., a musical recording) in another work (e.g., a documentary film), but only if the use of the first work is incidental and not deliberate.¹²² Thus, other than for uses of the work that are incidental and not deliberate, any other positive externalities of a copyright work, even if quite minimal, fall within the exclusive domain of the copyright holder. By contrast, the use of a vase or a desk lamp not subject to copyright (or to any other intellectual property right) is not subject to any form of restriction from the maker of the vase or desk lamp and the vase or desk lamp can be used freely in the documentary film, a positive benefit of owning that vase or desk lamp. Overall, the lists of exceptions to the exclusive rights of copyright holders are perhaps even more revealing of the extensive scope of copyright holders' exclusive rights than the provisions of the *CCA* dealing with the exclusive rights of copyright holders *per se*.¹²³ Educational institutions' specifically enumerated and carved-out exceptions, the four new user provisions that I discussed in Chapter 3, and the computer program limited copying exceptions for compatibility and backup purposes are illustrative of the far reaching scope of copyright.¹²⁴

If copyright holders benefit from even more positive externalities than owners of other forms of tangible private property, the reason for such expansionist tendencies must be sought elsewhere than because copyright is assimilated to property by lawmakers, the judiciary, and commentators.

See also the discussion on the theoretical justifications of copyright and copy ownership in Chapter 6 Part III.

¹¹⁹ *CCA*, *supra* note 1, ss 3, 27, 34.

¹²⁰ See the discussion on the non-substantial part doctrine in Chapter 3 Part II A.

¹²¹ *CCA*, *supra* note 1, s 30.7.

¹²² *Ibid*.

¹²³ *CCA*, *supra* note 1, ss 29-32.2.

¹²⁴ *Ibid*, ss 29.4-30.4., 29.21-29.24, 30.4. See the discussion in Chapter 3 Part II D and F.

Expansionism is not the proper argument to use to exclude copyright from the property institution.¹²⁵ In *The Future of Ideas*, Lessig invites us to rethink the current scope of property (including intellectual property), as well as broader legal and other frameworks under which we operate, to fully seize the opportunity and face the challenges of the Internet revolution.¹²⁶ For Lessig, the concept of property as the basis on which prosperity has been made possible is confusing us, but to question the scope of property is not to question property itself.¹²⁷

The debate on the nature of copyright needs to centre on substantive considerations to adequately respond to mischaracterizations or misplaced applications of underlying concepts of property. It would be misguided and confusing not to call copyright property simply for fear that the designation of copyright as a form of property interest will lead to absolutism, if copyright shares the attributes of property at a substantive level. It is not so much the “propertization” of copyright that can lead to expansionism, but rather a misinformed application of the concept of property to copyright, and the view that overlooks the existence of equally meritorious competing property rights and the operation of property’s intrinsic limitations.¹²⁸ As I argued above, distancing copyright from property is no safeguard against copyright’s progressive expansion.¹²⁹ The *sui generis* nature of copyright can be invoked to limit its scope as much as to expand it.¹³⁰ The proper application of the property framework to copyright may in fact lead to more constraining effects on the scope of copyright than would otherwise be the case.¹³¹

In this part, I have discussed the debate and controversies about characterizing copyright as a form of property. While some commentators claim that the property rhetoric around copyright may have contributed to the expansion of copyright, others argue that, on the contrary, the property institution contains all the necessary tools to adequately calibrate the scope of copyright in accordance with its underlying justifications and objectives. I have argued that, if copyright shares many of the property

¹²⁵ Penalver & Katyal, *supra* note 82 at 39 and 42, describe intellectual property as being distinct from and far more complex than tangible property, while at the same time sharing important similarities with tangible property.

¹²⁶ Lawrence Lessig, *The Future of Ideas* (New York: Random House, 2001) at 5-6.

¹²⁷ *Ibid.*, at 5-6. See also Lessig, *supra* note 69 at 172.

¹²⁸ Newman, *supra* note 82 at 259-267.

¹²⁹ See the discussion above in Part III of this chapter.

¹³⁰ *Ibid.*

¹³¹ See Newman, *supra* note 82, where the author reflects on the nature of property and on how it commands standardized and predictable rules that are not subject to the personal preferences of others. The

attributes at a substantive level, it is misguided to distance copyright from property for fear of its expansionist effects. The root cause of the progressive expansion of copyright is not necessarily its assimilation to property, but perhaps a misconception of property. No doubt, copyright is distinct in many respects from traditional forms of tangible property, but it also shares at a substantive level many common attributes with property that need to be investigated and acknowledged rather than evacuated.

The peculiarity of copyright and the strong political undercurrents surrounding its nature make the need to study copyright through the lens of property law and theory all the more pressing in an effort to debunk misconceptions about property and how its inept application may contribute to an inflation of copyright. For instance, what is the *resource* within copyright that can be the object of property and what is the nature of copyright holders' powers and privileges over the physical embodiments of their works that are owned by consumers and other users? These are among the questions that an investigation into the property attributes of copyright seeks to answer.

IV. The property attributes of copyright

The abstract nature of copyright, that is, its uncontained simultaneous reach to multiple objects owned by different persons, offers a field of study of high interest to property and copyright theorists alike. Copyright, like other forms of intellectual property, challenges our common understanding of property as it relates to tangible resources. My objective here is not to provide a detailed review of how property theory applies to copyright, but rather to focus on those key aspects that will help a better understanding of the nature of commercial copies of copyright works, as well as to offer reasoned responses to some of the fears about the assimilation of copyright to property that I discussed above in this chapter.¹³² To this end, the application of the ownership spectrum to copyright is particularly insightful for its ability to provide a nuanced approach to the property attributes of copyright.

author demonstrates how the application of a rigorous and consequentialist property approach to copyright would constrain rather than expand the current scope of copyright exclusive rights.

¹³² Commentators looking at the property attributes of intellectual property and copyright or reflecting more generally on their place within the property institution include: James E Penner, *The Idea of Property in Law* (Oxford: Clarendon, 1997) at 118–20; Harris, *supra* note 64 at 42–46; Spence, *supra* note 67 at 13–16; Dusollier 2007, *supra* note 62 at 314–321; Lametti, *supra* note 65; Penalver & Katyal, *supra* note 82, in particular at 39–50; in addition to the vast body of literature looking at the theoretical justifications of

James Harris defines the essence of every property institution as the twin manifestation of trespassory rules¹³³ and the existence of an ownership spectrum.¹³⁴ To what extent are the features that are common on the ownership spectrum described by Harris present with respect to copyright, i.e., (i) a juridical relation between a person and a resource, (ii) privileges and powers that are *prima facie* open-ended, and (iii) which authorize self-seekingness on the owner?¹³⁵ To what extent does copyright give rise to trespassory powers? In answer to the second question, copyright confers a list of exclusive rights on copyright holders with respect to their works, with correlative trespassory powers that are opposable to all.¹³⁶ The *CCA* describes when primary and secondary infringements to copyright occur,¹³⁷ as well as the remedies that are available to copyright holders.¹³⁸ The remedies for copyright infringement include injunction, (statutory) damages, accounts, and delivery up.¹³⁹ Criminal sanctions can be imposed, i.e. fines or imprisonment.¹⁴⁰

To answer the first question, i.e., the extent to which copyright shares the characteristics that are common to all ownership interests, I will apply each of the three features on the ownership spectrum to determine whether copyright shares the basic characteristics of property as a *resource* that can be owned.¹⁴¹ I will then consider how copyright interferes with the personal property rights of owners of commercial copies of copyright works and will complete the analysis of the property attributes of copyright by a discussion on the standardization of property.¹⁴²

intellectual property and copyright through the application of the theoretical justifications of property that I will discuss in Chapter 6 Part III.

¹³³ Harris, *supra* note 64 at 25, 86, “trespassory rules” refer to all rules which, by reference to a resource, impose obligations (negative or positive) upon an open ended range of persons, with the exception of some privileged individual, group, or agency (i.e. the owner(s)). They are open-ended, and give rise to various civil or criminal remedies such as damages, possessory recovery, injunction or restitution. They presuppose the existence of a separate, reasonably identifiable resource. See the discussion in Chapter 4 Part II.

¹³⁴ *Ibid* at 5, the ownership spectrum spans from “mere property” to “full-blooded ownership.” See the discussion in Chapter 4 Part II.

¹³⁵ *Ibid*.

¹³⁶ The *CCA*, *supra* note 1, s. 27 to 28.2 enumerates the primary and secondary infringements of copyright and of moral rights “for any person” who does certain acts without the consent of the copyright holder.

¹³⁷ *Ibid*.

¹³⁸ *Ibid*, ss 34ff.

¹³⁹ *Ibid*, ss 34, 38.1.

¹⁴⁰ *Ibid*, s 42 (1), on conviction or on indictment, the fine can be up to one million dollars and the imprisonment cannot exceed five years.

¹⁴¹ Harris, *supra* note 64 at 5.

¹⁴² See the discussion in Chapter 4 Part III B and C.

A. Copyright on the ownership spectrum

(i) Juridical relation between a person and a resource

The requirement of a juridical relation between a person and a resource on the ownership spectrum implies that the person and the resource can be identified, as well as a separateness between the two.¹⁴³ Every property institution also implies a scarcity in resources and an exercise of wealth allocation.¹⁴⁴ In the case of copyright, the state creates an “artificial scarcity” through copyright laws to prohibit the unauthorized reproduction and other acts that could otherwise be performed freely with respect to a work of authorship.¹⁴⁵

The *CCA* frequently refers to the “ownership of copyright” or “copyright owners.”¹⁴⁶ Without entering into metaphysical questions about what constitutes an author, in relation to copyright the *person* is generally identifiable as the author (joint authors) or other copyright holder(s) of the work as set out in the *CCA*.¹⁴⁷ Views diverge on the *resource* with which the author or copyright holder has a legal relationship. Commentators looking into the property attributes of copyright refer to the resource or property as being the intangible work,¹⁴⁸ or the bundle of exclusive rights,¹⁴⁹ while other commentators refer to the resource as the monopoly that copyright confers.¹⁵⁰

¹⁴³ This is a requirement for any property institution: see the discussion in Chapter 4 Part II.

¹⁴⁴ Harris, *supra* note 64 at 24.

¹⁴⁵ *Ibid* at 42-43; Lemley, *supra* note 63 at 1055.

¹⁴⁶ *CCA*, *supra* note 1, ss 2 “exclusive distributor” and “infringing,” 2.2, 2.7, 3, 14, 17, 24, 27, 27.1 refer to ownership in relation to copyright. See also *UKCDPA*, *supra* note 3, ss 2, 16 which refer to the exclusive rights of the “owner of copyright” or “copyright owner”. References to ownership of copyright or copyright owners are not in and of itself conclusive on the nature of copyright: Lametti, *supra* note 65 at 269.

¹⁴⁷ *CCA*, *supra* note 1, s 13 provides that the author of the work is the first owner of the copyright therein, as well as the circumstances under which the first owner of the copyright in the work is a person other than the author (e.g., the employer), ss 6.1, 6.2, 77 address situations where the author is unknown or cannot be located. For a discussion on the difficulties that arise in the identification of authors of works and other creators in intellectual property law, see Spence, *supra* note 67 at 25-29.

¹⁴⁸ See for example Harris, *supra* note 64 at 42-48, refers to the object protected by intellectual property as « ideational entities ». See also Dusollier 2007, *supra* note 62 at 316-321 who reviews the various theories on the nature of copyright and also the conceptual difficulties around the qualification of copyright as property.

¹⁴⁹ Spence, *supra* note 67 at 15-16; See Dusollier 2007, *supra* note 62 at 316-321 who reviews the various theories and also the conceptual difficulties around the qualification of copyright as property, cites at 318 as proponents of that view: A. Lucas et H.-J. Lucas, *Traité de la propriété littéraire et artistique*, 2d ed. (Paris: Litec, 2001) at 31-32.

¹⁵⁰ See Penner, *supra* note 132 at 118-20. For a review and critique of various characterizations of the “thing” or property, when analysing copyright as a form of property See Spence, *supra* note 67 at 13-16. See also Dusollier 2007, *supra* note 62 at 317-321 who discusses different approaches in qualifying

Each of the propositions describing the object of property that is owned in the case of copyright is deficient to some extent. To claim that copyright holders own their work is problematic to the extent that their correlative trespassory powers do not forbid uses by others of their works once they are published.¹⁵¹ One of the objectives of copyright is to encourage the dissemination of works.¹⁵² The trespassory powers that copyright confers on copyright holders once their works are published only allow them to restrict others from performing specific acts on their works.¹⁵³ To state that the object of copyright holders' ownership is a monopoly is also deficient to the extent that it does not describe adequately the powers and privileges that copyright confers.¹⁵⁴ It is also somewhat disappointing to claim that copyright holders' ownership pertains to a bundle of exclusive rights, for the same reason that to describe property through rights and relationships without reference to a resource is somewhat defective and incomplete.¹⁵⁵ Failure to take into account the role of the resource and the dynamics that revolve around the resource leaves out important distinctive features that set property apart from other legal institutions.¹⁵⁶

The shortcomings of characterizing the resource that copyright holders can own as the intangible work or as the bundle of exclusive rights diminish when we combine the two objects: the resource with which authors or copyright holders have a direct legal relationship is the *bundle of exclusive rights as they relate to the work*.¹⁵⁷ When copyright holders license or assign their copyright, it is the

copyright as property, either through the intangible work or through the bundle or exclusive rights that copyright law confers to authors.

¹⁵¹ Penner, *supra* note 132 at 118-119; Spence, *supra* note 67 at 13-14; see also Lametti, *supra* note 65 at 279-282; Dusollier 2007, *supra* note 62 at 318-321.

¹⁵² *Galerie d'art du Petit Champlain inc. v Théberge*, 2002 SCC 34 at para 30. See also the discussion on the competing objectives of the CCA, *supra* note 1, in Chapter 2 Part II.

¹⁵³ Spence, *supra* note 67 at 13-14. A distinction needs to be made between published works and unpublished works. In the latter case, the trespassory powers of authors to their works are greater: Harris, *supra* note 64 at 43-44.

¹⁵⁴ *Ibid.*, at 15, where the author observes that a monopoly generally denotes an undue power on specific products in a given market and that it is unlikely that copyright would ever have that effect, given its protection to specific works of art (and given that copyright protects the expression of ideas, not the ideas themselves).

¹⁵⁵ See for example Harris, *supra* note 64 at 121-124 on how we cannot dispense of the "person-thing" relationship to describe property and on his critique of Hohfeld's theory of property based on the correlation of rights; in the context of the characterization of copyright see, Dusollier 2007, *supra* note 62 at 317-318.

¹⁵⁶ *Ibid.*

¹⁵⁷ CCA, *supra* note 1 ss 3,15,18,21,26; Spence, *supra* note 67 at 15 conveys a similar idea but seems to focus more on the exclusive rights conferred by copyright as being the object of ownership. The link to the underlying work as part of the object is not stated explicitly.

work, with its unique attributes and qualities, that is the object of interest and scrutiny. The work, while not the object of ownership *per se*, cannot be evacuated from the “person-thing” relationship and is necessary, both as an intangible entity and in its material form, for an ownership interest to arise.

While copyright is generally associated with incorporeal or intangible property,¹⁵⁸ it exists only to the extent that a creation materializes and becomes a work, which attaches a corporeal or physical element to copyright. The fixation requirement requires eligible works¹⁵⁹ to be *fixed* in some materially identifiable form to be protected by copyright.¹⁶⁰ The separateness of copyright in the work from the copyright holder and from all others is fulfilled by the fixation requirement, which is consistent with the idea-expression dichotomy, i.e., the fact that copyright protects the expression of ideas, not the ideas themselves.¹⁶¹ As a result, the resource with which copyright holders have a legal relationship is the *bundle of exclusive rights as they relate to the work as materialized*.

Pinning down more precisely the *resource* that copyright holders *own* is not a trivial exercise. The exercise reveals that the work *per se* cannot effectively be the object of ownership in property terms and reveals the inadequacy of *ownership of the work* as inaccurate property parlance. Applying property concepts to copyright by reference to *ownership of the work* expands the nature of copyright beyond what it is and ever was. Parliament never intended copyright holders to *own* their work: the nature of copyright makes this relationship between copyright holders and lawful copies of their work impossible. However the progressive expansion of the scope of protection of copyright, in particular, the introduction of TPMs, the exclusive right of creators to control the distribution of copies of their works, the make-available right, and the rental right created an unprecedented rapprochement between copyright holders and their works.¹⁶²

While copyright requires a work to take a *fixed* physical form to exist, the material embodiment of the

¹⁵⁸ Art 899 CCQ; Hughes, Peacock & Armstrong, *supra* note 64 at 101.

¹⁵⁹ CCA, *supra* note 1 s 5.

¹⁶⁰ “Fixation” is not defined in the CCA, *supra* note 1. CCA, s 2 requires explicitly that computer programs, dramatic works and sound recordings be fixed in order to fall under the application of the CCA.

¹⁶¹ Lametti, *supra* note 65 at 279; Th  berge, *supra* note 152 at para 25 and also at para 145.

¹⁶² See the discussion on the expansion of copyright in Part II of this chapter. I discuss TPMs in Chapter 3 Part III B and the distribution right in Chapter 3 Part II F.

work (e.g., copies of books, musical recordings, films, etc.) is an entity separate from copyright.¹⁶³ Copyright and the material embodiment(s) of the work that copyright protects are generally owned by different parties, i.e., copyright holders own the copyright in the work while consumers own the books, musical recordings, DVD films, or computer program CDs that embody the protected work.¹⁶⁴ At the same time, copyright confers privileges and powers on copyright holders on the copies and material embodiments of works.¹⁶⁵ I will discuss the legal nature of the physical embodiments (i.e., commercial copies) of copyright works as the base to define copyright consumers' rights in Chapter 6.¹⁶⁶

Unlike other forms of property, the juridical relation that subsists between copyright holders and copyright is limited in time.¹⁶⁷ When the term of copyright expires, the work it protected falls into the public domain. The limited duration of a right is no stranger to the property institution. For example, in the civil law tradition, the real rights of emphyteusis and usufruct (each considered as a dismemberment of the right of ownership) have a limited duration of up to 100 years.¹⁶⁸ During the term of copyright, a juridical relation subsists between copyright holders and copyright, which fulfills the first characteristic common to all forms of ownership on the ownership spectrum.¹⁶⁹ Having established that copyright gives rise to a juridical relation between a person and a resource, I explore next the extent to which copyright confers *prima facie* open-ended privileges and powers.

¹⁶³ For example, 17 USC §202 provides: "Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyright work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object." In France, art L.111-3 CPI makes that distinction clear: "La propriété incorporelle définie par l'article L.111-1 est indépendante de la propriété de l'objet matériel..... Ces droits subsistent en la personne de l'auteur ou de ses ayants droit qui, pourtant, ne pourront exiger du propriétaire de l'objet matériel la mise à leur disposition de cet objet pour l'exercice desdits droits" The *CCA*, *supra* note 1, does not contain a similar provision.

¹⁶⁴ *Ibid.*

¹⁶⁵ See the discussion in Part IV B of this chapter.

¹⁶⁶ In particular see Chapter 6 Part II.

¹⁶⁷ *CCA*, *supra* note 2, s 6. For some commentators, the limited duration of copyright is incompatible with the concept of property. See for example Xifaras, *supra* note 60 at 411.

¹⁶⁸ Art 1119, 1123, 1197 CCQ.

¹⁶⁹ See also Dusollier 2007, *supra* note 62 at 316-317 who rejects the argument that the limited duration of copyright should discard the qualification of copyright as a form of property.

(ii) Open-ended privileges and powers

The second feature common to all ownership interests on the ownership spectrum is that the privileges and powers that a person has in a resource are *prima facie* open-ended.¹⁷⁰ The open-ended texture of powers and privileges distinguishes ownership interests from other non-ownership proprietary interests that confer specific privileges and powers.¹⁷¹ At first sight, the list of exclusive rights that copyright confers on copyright holders to perform or authorize certain acts with respect to their works have a closed texture to them,¹⁷² which for some commentators disqualifies copyright as a form of property.¹⁷³ While copyright confers a defined list of exclusive rights, the manner by which copyright holders can share, exploit, license, subdivide, and transfer copyright is open-ended.¹⁷⁴ Copyright holders can “use” their copyright by modifying and adapting the work protected by copyright or produce derivative works from it. They also have the freedom not to use copyright, which, unlike other forms of intellectual property, does not lead to the possible extinction of the right.¹⁷⁵ There is also an open-ended texture to copyright, in that the exclusive powers it confers can give rise to legal interpretation and uncertainty.¹⁷⁶ While copyright confers a defined list of exclusive rights on copyright holders, it allows a broad range of privileges and powers of exploitation and myriad interchangeable scenarios that have an open-ended texture to them. From that perspective, the second characteristic that is required for an interest to be on the ownership spectrum is met. I will now look at the third element common to all ownership interests within the property institution, the one that authorizes self-seekingness to the owner.

(iii) Privileges and powers that authorize self-seekingness to the owner

The third feature common to all ownership interests on the ownership spectrum is that the privileges and powers that a person has in the resource confers privileges and powers that authorize self-

¹⁷⁰ Harris, *supra* note 64 at 5.

¹⁷¹ Harris, *supra* note 64 at 55-58. For example easements would fall under the category of non-ownership proprietary interests.

¹⁷² See the discussion in Part II of this chapter.

¹⁷³ See for example Dusollier 2007, *supra* note 62 at 319.

¹⁷⁴ Harris, *supra* note 64 at 42-46, in particular at 45-46.

¹⁷⁵ The absence of the use of a trade-mark for an extended period of time can lead to it being expunged from the trade-marks registry: Canada *Trade-Marks Act*, RSC 1985, c. T-13, s 45.

seekingness for the owner.¹⁷⁷ *Self-seekingness* is the intimate relationship between the owner and the resource as to how the owner chooses to dispose of the resource, with *prima facie* no duty to account to any one on the merit or rationality of that preference.¹⁷⁸ By its design, copyright confers self-seekingness on copyright holders.¹⁷⁹ It is a central feature of the operation of copyright that copyright holders may decide how, when, and to whom they want to dispose of copyright, with no duty to account to any one on the merit or rationality of that choice.¹⁸⁰ As the Supreme Court noted in *Robertson v Thomson Corp*,¹⁸¹ on the issue of whether freelance authors had impliedly or not licensed the right to the *Globe and Mail* newspaper to republish their articles in electronic databases: “parties are, have been, and will continue to be, free to alter by contract the rights established by the *Copyright Act*.”¹⁸² While the modalities for the exercise of self-seekingness may vary between an individual author and a corporate copyright holder, self-seekingness is present in both cases.¹⁸³

To sum up, in addition to conferring trespassory powers, copyright shares to a large extent the three characteristics that are common on Harris’s ownership spectrum. There is a juridical relation between copyright holders and copyright that confers powers and privileges that have a certain *prima facie* open-ended texture and that authorize self-seekingness to copyright holders. While copyright displays

¹⁷⁶ *CCA*, *supra* note 1, s 3 states: “‘copyright’, in relation to a work, means the sole right to produce or reproduce the work.....and includes the sole right....” [emphasis added]. See also Menell, *supra* note 64 at 744-745.

¹⁷⁷ Harris, *supra* note 64 at 5.

¹⁷⁸ *Ibid* at 65.

¹⁷⁹ *Ibid* at 46.

¹⁸⁰ *CCA*, *supra* note 1, s 13(4) provides: “The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other right by licence,”; s 14.1 (1) also supports the self-seekingness aspect of copyright through moral rights, i.e. the right to the integrity of the work and the right to be associated with the work, which can be invoked by authors (i.e. physical persons). However, moral rights *per se* are inalienable (but they can be waived): at s 14.1(2).

¹⁸¹ 2006 SCC 43.

¹⁸² *Ibid*, at para 58. Other cases illustrate the broad freedom that copyright holders have on the terms under which they make their copyright works commercially available, beyond the terms of their constitutive legislative act. For example, cases where courts uphold the characterization made by copyright holders of the transaction on the copy of a copyright work as a licence, rather than as a sale. As one recent example, see *Vernor v Autodesk, Inc.*, F.3d 2010 WL 3516435 (9th Cir. 2010). See also the discussion in Chapter 7 Part IV. I discuss the interaction between copyright as conferred by the *CCA*, *supra* note 1 and copyright holders’ exercise of freedom of contract in Chapter 3 Part III.

¹⁸³ I.e., corporations may be subject to internal rules of governance or specific authorisations that would affect how they would make decisions with respect to the exclusive copyright that they hold in a work but to the outside world, they generally have open-ended powers and privileges in how they exploit the copyright they hold.

unique features, it fulfills the characteristics that are common on the ownership spectrum as a resource that can be owned. In the context of defining consumers' rights to commercial copies of copyright works, copyright holders' powers and privileges to the embodiments of their works display specific characteristics that I will now investigate further.

B. Copyright holders' powers and privileges to embodiments of their works

I have argued above in this chapter that the *resource* to consider when assessing whether copyright shares the attributes commonly associated with property is the bundle of exclusive rights that the *CCA* confers on a work as materialized.¹⁸⁴ It is the combination of the exclusive rights as they pertain to *the work as materialized* (and not the work itself, nor the physical embodiment of the work) that together form a species of intangible personal property.¹⁸⁵ The physical embodiment through which copyright and the work it protects come to life (e.g., the books, musical recordings, film DVDs) is not the resource on which copyright holders exercise their *prima facie* open-ended powers and privileges, as with other forms of tangible property.¹⁸⁶ The physical embodiments of copyright works are separate *resources*, that is, distinct forms of personal property.¹⁸⁷

In addition to the *immediate* powers and privileges that copyright holders have with respect to copyright, copyright holders have *remote* specific interests over the material embodiments of their works.¹⁸⁸ The interests that copyright confers on copyright holders in the embodiments of their works owned by consumers and other users have been compared to a negative easement,¹⁸⁹ with the difference that in the case of copyright the property interest pertains to the personal property of others and not real property.¹⁹⁰ Others have made an analogy of the relationship copyright holders have with

¹⁸⁴ See the discussion in Part IV A of this chapter, in particular, Part IV A (i).

¹⁸⁵ *Ibid.*

¹⁸⁶ See the discussion in Part IV A (ii).

¹⁸⁷ *Ibid.* This is so after the first publication has occurred. Before the first publication of the work, the exclusive right to authorize the first publication confer exclusionary powers on the physical embodiment of the work as well: Harris, *supra* note 64 at 43-44.

¹⁸⁸ Julie E. Cohen "Overcoming Property: Does Copyright Trump Privacy?" (2002) U. Ill. J.L. Tech. & Pol'y 375, at 377 where the author notes: "copyright law gives copyright owners (some) rights in things as proxies for rights in works."

¹⁸⁹ Christopher M. Newman, "Patent Infringement as Nuisance" (2009) 59 Cath. U. L. Rev. 61 [Newman 2009] at 106. A distinction needs to be made between negative easements created by copyright and negative easements or servitudes that are potentially created by copyright holders through contract: see the discussion in Chapter 7 Part IV.

¹⁹⁰ Except for some copyright works, e.g., architectural works. Servitudes typically apply to real property. Courts have been reluctant to enforce servitudes on personal property or chattels. See Thomas Merrill &

the embodiment of their works to a usufruct, one of the dismemberments of ownership in the civil law tradition.¹⁹¹ The remedies available to copyright holders in case of infringement include gaining physical control over embodiments of works, such as by seizure and delivery up of infringing copies of copyright works.¹⁹²

While the bundle of exclusive rights that the *CCA* confers on a work as materialized displays the attributes of property with *prima facie* open-ended powers and privileges in how copyright holders exploit it,¹⁹³ copyright holders' specific powers to interfere with the physical embodiment of their works as owned by consumers and other users are specific and remote and do not have the *prima facie* open-ended texture that is common to all ownership interests on the ownership spectrum.¹⁹⁴ Copyright holders' close-ended and remote powers on the embodiments of their works owned by consumers and other users are a form of non-ownership proprietary interest.¹⁹⁵ The constrained non-ownership proprietary interest in the embodiment of works contrasts with expansive property language whereby copyright holders *own* their work.¹⁹⁶

As commercial copies of copyright works distributed online lose their physical object embodiment, as non-negotiated standard end-user agreements increasingly provide that copyright holders retain ownership in the copies, and given the uncertain application of the exhaustion or first sale doctrine, the powers and privileges of copyright holders over the physical copies of their works made available

Henry Smith, "Optimal Standardization in the Law of Property: the Numerus Clausus Principle" (2000) 110 Yale L.J. 1 at 18; G. O. Robinson, "Personal Property Servitudes" 71 U. Chi. L. Rev. 1449; Molly Shaffer Van Houweling, "The New Servitudes" (2008) 96 Geo. L.J. 885.

¹⁹¹ Lametti, *supra* note 65 at 281-282 where the author highlights how copyright holders cannot use the physical embodiment of their work owned by others (*usus*) unless they simultaneously own the physical embodiment of the copyright work together with the copyright. While copyright holders control to a large extent the economic activity that can be performed with that physical embodiment of the copyright work (e.g., reproduction and some rental rights) (*fructus*), they do not control the transfer of the physical embodiment when such physical embodiment is owned by another party and that they had authorized the first sale of that physical embodiment (*abusus*).

¹⁹² *CCA*, *supra* note 1, s 34(1).

¹⁹³ See the discussion in Part IV A (ii) of this chapter.

¹⁹⁴ Harris, *supra* note 64 at 55-58: non-ownership proprietary interests are specific, they lack the *prima facie* open-ended powers and privileges generally associated with ownership interests. For example, easements would fall in that category.

¹⁹⁵ *Ibid.*

¹⁹⁶ See the discussion in Part IV A (i) of this chapter on the resource to which copyright holders have a legal relationship as not being the copyright work itself and the consequences thereof.

to consumers are potentially expanding.¹⁹⁷ The new methods of distribution of commercial copies of copyright works raise questions related to the nature of copyright holders' interest in the copies. Can copies with no physical object embodiment be owned?¹⁹⁸ If so, do copyright holders effectively retain ownership in the copies they distribute as provided by the terms of the contract? In the case of commercial copies made available to consumers for an indefinite duration (in contrast with a service), it seems that copyright holders' powers and privileges over the copies would still lack the open-endedness that distinguishes ownership from other property interests, regardless of the terms of contract.¹⁹⁹ Copyright holders' rights in commercial copies distributed online with contract terms restricting consumers' ability to transfer their copies would create an interest akin to a non-ownership proprietary interest, to the extent that such restrictions are valid and enforceable.²⁰⁰

Copyright holders' rights in relation to the embodiment of works owned by consumers is a non-ownership proprietary interest that is potentially expanding in the online distribution environment. I will now turn to one last important aspect of the property institution and how copyright fares with the *numerus clausus* principle.

C. Copyright and the standardization of property

The standardization of property or the *numerus clausus* is the principle by which there is a fixed and closed list of property interests recognized by law and as one corollary, limitations on how owners can alter the nature of their property rights.²⁰¹ In Chapter 4, I discussed how I intend to apply the *numerus clausus* principle to define copyright consumers' rights, i.e., as a tool to calibrate the effects of the property regime created by the CCA and copyright holders' freedom of contract.²⁰²

Copyright may not fare so well on the terrain of the *numerus clausus* principle compared to other

¹⁹⁷ See the discussion in Chapter 3 Part II F on exhaustion or the first sale doctrine, and Part III on the interaction between copyright, contracts and TPMs.

¹⁹⁸ I discuss the nature of commercial copies of copyright works distributed online with no supporting physical object in Chapter 8.

¹⁹⁹ See the discussion in Part IV A (ii) of this chapter. See the discussion on the distinction between goods and services in Chapter 8 Part II B.

²⁰⁰ In addition to general questions of enforceability of non-negotiated standard end-user agreements, it is not clear that such clauses would be enforceable because of the exhaustion or first sale doctrine: see the discussion in Chapter 8 Part III and also in Chapter 7 Part III A (ii).

²⁰¹ See the discussion on the standardization of property in Chapter 4 Part III.

forms of property.²⁰³ On the one hand, copyright and other intellectual property are relatively well-known and stable forms of property.²⁰⁴ The list of exclusive rights that copyright confers on copyright holders is reasonably well defined and identifiable.²⁰⁵ Copyright holders can assign their copyright in whole or in part (e.g., with respect to the exercise of one exclusive right only), and for partial assignments the *CCA* treats the assignee and assignor as copyright holders for the part assigned and for the part retained.²⁰⁶ An analogy can be made between partial assignments and divided co-ownership of tangible property.²⁰⁷ There are formal requirements for copyright assignments to be valid which corroborate to some extent the standardization of property.²⁰⁸ While the *CCA* confers on copyright holders broad discretionary powers as to how they can authorize others to perform the acts reserved to them by copyright (*qua* duration, territory, type of exclusive right, and among an open-ended group of individuals), only exclusive licences create a separate proprietary interest and are subject to formal requirements.²⁰⁹ By contrast, non-exclusive licences confer contract rights.²¹⁰ On that basis, copyright could exemplify the *numerus clausus* principle.

On the other hand, copyright may be an outlier to the *numerus clausus* principle in other respects. Given the intangible nature of copyright, courts may be more inclined to interpret the scope of copyright and other intellectual property in a less predictable manner than in relation to tangible

²⁰² *Ibid.*

²⁰³ Newman 2009, *supra* note 189 at 105ff.

²⁰⁴ Merrill & Smith, *supra* note 190 at 19 note that intellectual property as protected by statute, eg patents and copyright, are stable forms of property and that how in the U.S. the federal preemption doctrine restricts the alteration of IP interests at the state level.

²⁰⁵ See the discussion on the nature of copyright as set out in the *CCA*, *supra* note 1 in Part II of this chapter.

²⁰⁶ *CCA*, *supra* note 1, s 13(5) provides: “Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee, with respect to the rights so assigned, and the assignor, with respect to the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and this Act has effect accordingly.”

²⁰⁷ Art.1010 CCQ defines divided co-ownership as “where the right of ownership is apportioned among the co-owners in fractions, each comprising a physically divided private portion and a share of the common portions.”

²⁰⁸ The assignments do not need to be registered however *CCA*, *supra* note 1, s 13(4) provides that “no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner’s duly authorized agent.”

²⁰⁹ See the discussion in Part II and in Part IV A (ii) of this chapter on copyright holders’ open-ended powers and privilege to exploit their exclusive rights. *CCA*, *supra* note 1, s13 (4)-(7). See also *Robertson v Thomson Corp.*, 2006 SCC 43 at para 56, where the majority judgment cited *Ritchie v Sawmill Creek Golf & Country Club Ltd.* (2004), 35 C.P.R. (4th) 163.

²¹⁰ *Ibid.*

property.²¹¹ Copyright, unlike other forms of property (e.g., real estate) and intellectual property (patents and to a large extent trademarks)²¹² does not need to be registered for the *CCA* to confer protection on copyright holders with respect to their works.²¹³ Registration plays an important notification function for third parties, notifying the existence and scope of property rights that are consistent with the standardization of property.²¹⁴ However, registration is neither a constitutive element of all property interests nor is it necessary with respect to all forms of property to assert title. Last but not least, a troublesome aspect of copyright with respect to its conformity to the *numerus clausus* principle concerns the effects of the extension of copyright by contract, whereby copyright holders potentially create a new form of property interest in commercial copies of copyright works. I will explore this particular effect of the commercialization of copyright on the standardization of property with respect to the nature of commercial copies of copyright works in Chapter 6.²¹⁵

To the extent that copyright shares the attributes of property, the proper question to ask is not so much whether it conforms with the *numerus clausus* principle as justifying why copyright needs to comply as much as possible with the *numerus clausus* principle as a governance norm for the judiciary and law- and policy-makers.²¹⁶ To what extent are the concerns favouring the standardization of property in the realm of tangible property as similar in the field of intangible property as copyright? In addition to asking whether copyright exemplifies the *numerus clausus* principle, the application of the principle to copyright holders' commercial practices that alter consumer property rights in copies of copyright works is a different question that I will address in Chapter 7.²¹⁷

²¹¹ *Ibid*, where the authors note that while intellectual property eg patents, copyright are relatively stable forms of property, the *numerus clausus* is at its weakest in the area of intellectual property, based on the tendency of courts to create new intellectual property interests. See also the discussion in Part III of this chapter on the debate around assimilating copyright to a form of property.

²¹² Inventions need to be registered as patents to confer exclusionary powers to patent holders: Canada *Patent Act*, RSC 1985, c. P-4. Trade-marks can be registered but unregistered trade-marks can also benefit from protection: Canada *Trade-Marks Act*, RSC 1985, c. T-13.

²¹³ *CCA*, *supra* note 1, s 54 whereby registration of copyright is optional. The *Berne Convention*, *supra* note 39, article 5(2) provides that the enjoyment and exercise of rights with respect to protected works shall not be subject to any formality requirements.

²¹⁴ See the discussion in Chapter 4 Part IV.

²¹⁵ See the discussion in Chapter 6 Part II C.

²¹⁶ I discuss the justifications for the application of the *numerus clausus* principle in Chapter 4 Part IV. For a discussion on the necessity of maintaining fragmentation in copyright see: Harvard Law Review Note, "A Justification for Allowing Fragmentation in Copyright" (2011) 124 Harv. L. Rev. 1751.

²¹⁷ The *numerus clausus* principle as it applies to copy ownership is discussed briefly in Chapter 6 Part II C. See also the discussion in Chapter 7, Part IV.

To sum up, two distinct proprietary interests emerge when looking at copyright through the lens of property theory. The first interest relates to copyright as a whole when considered as the object capable of commercial exploitation. It contains all three elements that are common on the ownership spectrum and confers trespassory powers to copyright holders.²¹⁸ The resource is not the copyright work *per se*, but the *bundle of exclusive rights as they relate to the work as materialized*.²¹⁹ The requirement of *prima facie* open-ended powers and privileges is fulfilled differently than with respect to tangible forms of property.²²⁰ While the list of exclusive powers is relatively closed and defined, the exploitation or uses that copyright holders can make of their copyright are endless.²²¹

The second interest focuses on the nature of copyright holders' relationship with the physical embodiment of their works (e.g., the commercial copies owned by consumers or other users). A property analysis reveals that it is a limited non-ownership proprietary interest.²²² Unlike copyright when viewed as a whole, it lacks the open-ended powers and privileges that are required to qualify as an ownership interest.²²³ Finally, the application of the *numerus clausus* principle to copyright as a norm of judicial governance merits further investigation, in particular given the intangible nature of copyright and the non-rivalrous nature of the works that it protects.²²⁴

V. Conclusion

Unlike the laws in other jurisdictions, the *CCA* does not explicitly define the nature of copyright as property or a property right.²²⁵ The *CCA* confers on copyright holders a list of exclusive rights to restrict acts that can be performed on their works that are opposable to all.²²⁶ Two distinct proprietary interests emerge when looking at copyright through the lens of property theory. The first interest relates to copyright as a whole when considered as the entity that is the object of commercial exploitation: it contains all three elements of an ownership interest on the ownership spectrum and confers trespassory powers to copyright holders.²²⁷ However, copyright does not confer ownership in

²¹⁸ See the discussion in Part IV A of this chapter.

²¹⁹ See the discussion in Part IV A (i) of this chapter.

²²⁰ See the discussion in Part IV A (ii) of this chapter.

²²¹ *Ibid.*

²²² See the discussion in Part IV B of this chapter.

²²³ *Ibid.*

²²⁴ See the discussion in Part IV C of this chapter.

²²⁵ See the discussion in Part II of this chapter.

²²⁶ *Ibid.*

²²⁷ See the discussion in Part IV A of this chapter.

the work but in *the bundle of exclusive rights as they pertain to the work as materialized*.²²⁸ The second interest focuses on the nature of copyright holders' relationship to the physical embodiment of their works (e.g., the commercial copies owned by consumers or other users): it is a limited, remote, non-ownership proprietary interest.²²⁹ In recent years, both copyright as a limited form of property and the specific non-ownership proprietary interest that it confers on copyright holders on the physical embodiments of works (owned by consumers and other users) are expanding.²³⁰

The characterization of copyright as a form of private property is controversial and politically charged.²³¹ The analysis of the property attributes of copyright that I conducted here is revealing and provides responses to some of the concerns raised in the debate about the nature of copyright. First, copyright parlance and rhetoric about copyright holders *owning their works* is far removed from what Canada and other jurisdictions created by statute. By its design, the *CCA* and similar laws in other jurisdictions never instituted such a relationship between copyright holders and lawful copies of their works and likely never will.²³² Also, copyright holders' interest in the embodiments of their works (e.g., commercial copies made available to consumers) is a remote, specific proprietary interest that does not belong on the ownership spectrum. Second, as a corollary to the first observation, there is reason to be concerned about erroneous property language whereby copyright holders *own* their works: it obliterates the framework of copyright as it exists. To be sure, what is troublesome is not that copyright is a limited form of property, which as the above analysis revealed is difficult to debate, but an erroneous and potentially dangerous application of the concept of property to copyright.

No doubt the scope of copyright has been expanding in recent years. It may be attributable in part to a wrongful application of the concept of property to copyright. An erroneous application of property can be achieved perhaps more easily than with respect to tangible property, given the abstract and ubiquitous nature of copyright. As I argued in this chapter, negating the property nature of copyright altogether cannot counter the expansion of copyright and does a disservice to the debate by describing copyright as something that is removed from its nature as constructed by statute. Defining copyright as a *sui generis* right is no guarantee against the expansion of copyright. On the contrary, a reasoned analysis of the application of property theory to copyright reveals the limited scope of copyright.

²²⁸ *Ibid.*

²²⁹ See the discussion in Part IV B of this chapter.

²³⁰ See the discussion in Part IV A and B of this chapter.

²³¹ See the discussion in Part III of this chapter.

²³² See the discussion in Part IV A of this chapter.

At a time when the legitimacy of copyright is increasingly under threat, there is an urgent need for coherence. Property provides a robust legal and theoretical framework to address complex questions around competing rights and interests, including consumers' rights to commercial copies of copyright works. The *CCA* is a very incomplete enunciation of copyright holders' and other participants' rights and obligations.²³³ The *CCA* relies quite heavily on the underlying institutions of property and contract.²³⁴ Looking at copyright through the lens of existing legal institutions, such as property and, to a certain extent contract, is a test of its internal coherence and offers a better guarantee of the ability of copyright to evolve within broader spheres of interest and retain its legitimacy. Among other things, a better understanding of the nature of copyright as a unique and limited form of property helps define the legal nature of, and theoretical justifications supporting, the rights to commercial copies of copyright works. I explore these two questions in the next chapter.

²³³ See the discussion in Chapter 3 Part III on the interaction between copyright and contracts.

²³⁴ *Ibid.*

Chapter 6

The Nature of Commercial Copies of Copyright Works and Justifications of Ownership

I. Introduction

In the previous chapter, I applied the property law and theory framework introduced in Chapter 4 to define the nature of copyright. I concluded that copyright is a limited form of property that also includes a specific non-ownership proprietary interest in commercial copies of copyright works. In this chapter, I build on the insights of the nature of copyright and further apply the property law and theory framework to define the nature of commercial copies of copyright works. I look at various property theories to justify what the proper scope of ownership of commercial copies of copyright works should be on the ownership spectrum.¹

In Part II, I look at the property attributes of commercial copies of copyright works and at where they are located on the *ownership spectrum*.² In Part III, I look at the various theoretical justifications that underlie intellectual property and personal property in commercial copies of copyright works and how they influence the determination of what the proper scope of copy ownership should be. I conclude in Part IV that a property theory approach to define the nature of copies of copyright works underscores the extent to which they are distinct and in some ways deficient when compared to other forms of property. At the same time, the application of justificatory theories to commercial copies of copyright works sets a normative framework that emphasizes the need to make room for copy ownership and preserve it as an important vehicle to allow copyright users to fulfill the main goals of copyright.

¹ I discuss the “ownership spectrum” as developed by James W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996) in Chapter 4 Part II.

² *Ibid.*

II. The nature of commercial copies of copyright works

A. A peculiar form of personal property

The nature of commercial copies of copyright works is a much less explored area in comparison to the nature of copyright.³ One may be inclined to look at Canada's *Copyright Act* [CCA]⁴ for answers, but one would be looking in vain. As I discussed in Chapter 2 and Chapter 3, copyright laws are generally structured around defining the exclusive rights and remedies of copyright holders and to provide exceptions for certain acts that can be performed on copyright works without the authorization of copyright holders.⁵ Unlike legislation in other jurisdictions, the CCA does not define the nature of copies of copyright works.⁶ Even with respect to exceptions to copyright infringement or users' rights, the CCA is mostly silent on the legal relationship between the user performing the permitted acts and the copy of the work and on the attributes of the copy of the work.⁷ The application of some of the

³ See the discussion on the nature of Copyright in Chapter 5. Authors discussing the nature of ownership of copies of copyright works include Joseph P. Liu, "Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership" (2001) 42 William and Mary Law Review, 1245 [Liu, "Owning Digital Copies"], whereby the author looks more broadly at the concept of "possession" of digital copies, beyond the scenarios of lawfully purchased copies of copyright works. See also Michael Seringhaus, "E-Book Transactions: Amazon "Kindles" The Copy Ownership Debate" (2009) 12 Yale J. L. & Tech. 147. For a European perspective, see Séverine Dusollier, *Droit d'auteur et protection des oeuvres dans l'univers numérique*, 2d ed. (Bruxelles: Larcier, 2007) [Dusollier 2007] in particular at 377-418.

⁴ RSC 1985, c C-42.

⁵ In particular, see the discussion in Chapter 2 Part II and in Chapter 3 Part II.

⁶ Other copyright laws are more explicit on the nature of copies of copyright works. For example in the US, 17 USC § 202 provides: "Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyright work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object." In France, art L.111-3 CPI, makes the distinction between ownership of copyright as intangible property and ownership in the material object that embeds the copyright work as follows: "La propriété incorporelle définie par l'article L.111-1 est indépendante de la propriété de l'objet matériel..... Ces droits subsistent en la personne de l'auteur ou de ses ayants droit qui, pourtant, ne pourront exiger du propriétaire de l'objet matériel la mise à leur disposition de cet objet pour l'exercice desdits droits."

⁷ This is the case for the application of the non-substantial part doctrine (CCA, *supra* note 4, s 3) see the discussion in Chapter 3 Part II A; the fair dealing provisions (ss 29-29.2), the non-commercial user-generated content provision (s 29.21) the private copying regime (s 80), exceptions with respect to educational institutions and libraries, archives and museums, although for some of the permitted uses it is implicit that the copy of the work from which they are allowed to perform acts without the authorization of copyright holders is under the control and power of the educational institution or library, archives and museums (ss 29.4-30.5). The later listening or viewing exception requires that the program to be recorded was received legally (s 23.23(1) (a)).

exceptions to copyright infringement requires that the acts be performed on a copy that the user *owns*, or on a *lawfully acquired copy*.⁸ The transfer of ownership of the commercial copies of copyright works is also central to the application of the exhaustion of the exclusive distribution right (or first sale doctrine) introduced in the *CCA* in 2012.⁹ Still, the exact nature of copies of copyright works is left largely undefined by the *CCA*, with some fragmented implications by default through what copyright exclusive rights do not already cover. This is where property law and theory step in, as sources to augment the comprehension of the nature of commercial copies of copyright works.

Every consumer commercial transaction of a copyright work traditionally involves two sets of rights where one tends to overshadow the other. When consumers buy a book, a music CD or a film DVD, they are the rightful owners of this chattel or personal property. Unlike copyright, the qualification of commercial copies of copyright works as personal property is at first sight less controversial; at least it was until recently.¹⁰ However, one can reasonably assume that even the less-informed consumers know or ought to know that this chattel is like no other one. They should know or ought to know that by buying a book, a CD, or a DVD they do not become the owner of the expressive work that it contains.¹¹ The dichotomy between the chattel and the copyright that protects the copyright work has been traditionally presented as the distinction between the tangible and the intangible, the former being the physical embodiment of the copyright work owned by the purchaser of a copy, and the latter being the bundle of exclusive rights as they relate to the work as materialized owned by the copyright holder.¹² Because copyright holders have a specific non-ownership proprietary interest in commercial copies of their works, and for reasons I discuss below in this chapter, the separateness of the tangible

⁸ This is a requirement for the application of the reproduction for private purposes exception (*CCA*, *supra* note 4, s 29.22), the backup copies' exception (s 29.24), the exception applying to computer programs (s 30.6). See the discussion on the scope of these exceptions to copyright infringement in Chapter 3 Part II.

⁹ *CCA*, ss3 (1)(j), 15 (1.1)(e), 18 (1.1) (b) where introduced with the entry into force of Canada's *Copyright Modernization Act*, SC 2012, c. 20 [*CCMA*]. See the discussion on the exhaustion or first sale doctrine in Chapter 3 Part II F.

¹⁰ See the discussion on the debate around the association of copyright with a form of property in Chapter 5 Part III and on the property attributes of copyright in Chapter 5 Part IV. See the discussion on whether digital copies distributed online with no hand to hand exchange of physical medium constitute goods in Chapter 8.

¹¹ As Julie E. Cohen, "Overcoming Property: Does Copyright Trump Privacy?" (2002) U. Ill. J.L. Tech. & Pol'y 375 [Cohen, "Does Copyright Trump Privacy?"] at 378, notes: "Conditions imposed on would-be users of things embodying copyright works far outstrip any conditions imposed on would-be users of other kinds of things."

¹² See the discussion in Chapter 5, Part IV A (i).

personal property of consumers and the intangible or incorporeal property of copyright holders is porous at best.¹³

The prominence of the literary, musical, or artistic work that forms the essence of the chattel trivializes the physical medium that supports it, and is relatively insignificant in comparison to the musical, literary work, or other work of art protected by copyright.¹⁴ In that respect, copyright's ascendance on the physical embodiment is different from other intellectual property rights such as trade-marks or patents that tend, in commerce, to be more incidental to the product to which they are associated.¹⁵ The online distribution of copyright works reinforces the trivialization of the physical embodiment in contrast to the creative work because the transfer of a physical component to consumers with the work becomes less apparent.¹⁶

The juxtaposition of copyright holders' exclusive rights as they relate to their work with the personal property of consumers to the copies makes the application of property law and theory to commercial copies particularly intriguing and challenging. The juxtaposition is also essential to defining and understanding the scope of copyright consumers' rights. To this end, I now look into the property attributes of commercial copies of copyright works, i.e., the twin manifestation of trespassory rules and their location on the ownership spectrum.

B. Commercial copies of copyright works and the ownership spectrum

James Harris defines the essence of every property institution as the twin manifestation of trespassory rules¹⁷ and the existence of an ownership spectrum.¹⁸ To what extent are the features that are common

¹³ See the discussion in Chapter 5 Part IV B and in Part II B of this chapter.

¹⁴ However, Dusollier, *supra* note 3 at 379 notes that in theory, there is no hierarchy between the two competing rights.

¹⁵ In the case of the commercial copy of a copyright work, the main object of the transaction is the work, to which the exclusive rights of copyright holders are related. In the case of other goods to which a trade-mark or patent are related, they are not the main object (if at all) of the commercial transaction but incidental.

¹⁶ By contrast, in a transaction that involves a music CD or film DVD the CD or DVD the digital copy is embedded in a physical medium that is normally sold. I analyse the legal nature of digital copies distributed online with no physical object in Chapter 8.

¹⁷ Harris, *supra* note 1 at 25, 86, "trespassory rules" refer to all rules which, by reference to a resource, impose obligations (negative or positive) upon an open-ended range of persons, with the exception of some privileged individual, group, or agency (i.e. the owner(s)). They are open-ended, and give rise to various civil or criminal

on the ownership spectrum described by Harris present with respect to commercial copies of copyright works, i.e., (i) a juridical relation between a person and a resource, (ii) privileges and powers that are *prima facie* open-ended, and (iii) which authorize self-seekingness on the owner?¹⁹ To what extent do commercial copies of copyright works give rise to trespassory powers? In answer to the second question, owners of commercial copies of copyright works have trespassory powers similar to owners of other forms of personal property, powers that give rise to legal remedies, including reversion of the personal property in case of theft.²⁰

To answer the first question, i.e., the extent to which commercial copies of copyright works share the characteristics that are common to all ownership interests, I will apply each of the three features on the ownership spectrum to determine the extent to which consumers *own* the commercial copies of copyright works they purchase.

(i) Juridical relation between a person and a resource

The requirement of a juridical relation between a person and a resource on the ownership spectrum implies that the person and the resource can be identified, as well as separateness between the two.²¹ Every property institution also implies a scarcity in resources and an exercise of wealth allocation.²² In the case of consumers and commercial copies of copyright works embedded in physical objects, the requirement of a juridical relation between a person and a resource is easily fulfilled. The consumer and the commercial copies of copyright works are identifiable and there is a separateness between the two. The situation is less clear with respect to commercial copies of copyright works distributed online with no physical supporting medium. As I will discuss in Chapter 8, the nature of commercial copies of copyright works distributed online with no supporting physical supporting medium is uncertain, more specifically, whether they can qualify as *goods* under sale of goods and statutory

remedies such as damages, possessory recovery, injunction or restitution. They presuppose the existence of a separate, reasonably identifiable resource. See the discussion in Chapter 4 Part II.

¹⁸ *Ibid* at 5, the ownership spectrum spans from “mere property” to “full-blooded ownership.” See the discussion in Chapter 4 Part II.

¹⁹ *Ibid*.

²⁰ For example see: the British-Columbia *Sale of Goods Act* [RSBC 1996] c 410, s 29. Under Québec’s civil law, the nature and scope of remedies depend on the good faith of the person in possession and on the application of prescription rules: art 928-933 CCQ.

²¹ This is a requirement for any property institution: see the discussion in Chapter 4 Part II.

consumer law.²³ Without entering the debate on the proper qualification of *goods* at this point, even if commercial copies of copyright works distributed online with no physical supporting medium were not goods, this should not preclude commercial copies of copyright works from being an object or a resource capable of ownership. As I demonstrated in Chapter 5, copyright, as well as other forms of intangible property, can fulfill the requirement of a legal relationship between a person and a resource.²⁴ Commercial copies of copyright works distributed online with no supporting physical medium are easily identifiable and retain their separateness from consumers. We can safely assume that commercial copies of copyright works, whether supported by a physical object exchanged from hand-to-hand or not, fulfill the first requirement on the ownership spectrum.

(ii) Open-ended privileges and powers

The second feature common to all ownership interests on the ownership spectrum is that the privileges and powers that a person has with respect to a resource are *prima facie* open-ended.²⁵ The open-ended texture of powers and privileges is central to distinguishing ownership interests from other non-ownership proprietary interests that confer limited and specific privileges and powers.²⁶ On that front, the open-endedness of copyright consumers' powers and privileges on their commercial copies of copyright works is increasingly diminished with the continued expansion of copyright holders' exclusive rights as accelerated in recent years.²⁷ It is as if, as Julie Cohen notes, the fear of weakening copyright as intangible property justified each time increasing powers in the property of others (e.g. commercial copies) through which it takes form.²⁸

The addition of exclusive rental rights,²⁹ the right to prevent parallel imports and the exclusive right of

²² Harris, *supra* note 1 at 24.

²³ See the discussion in Chapter 8, in particular in Part II.

²⁴ See the discussion in Chapter 5 Part IV A (i).

²⁵ Harris, *supra* note 1 at 5.

²⁶ *Ibid* at 55-58. For example easements would fall under the category of non-ownership proprietary interests.

²⁷ See the discussion on the expansion of copyright in Chapter 5 Part II.

²⁸ Cohen, "Does Copyright Trump Privacy?", *supra* note 11 at 379.

²⁹ In Canada, the exclusive right to authorize the rental of copies of copyright works applies only to computer programs and to sound recordings of musical works: *CCA*, *supra* note 4 s 3(1) (h)-(i). In the US, see 17 USC §106(3), §109(b) (1) (A). In Europe, EC, *Parliament and Council Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property*, [2006] OJ, L376/28, at art 3, requires all member states to provide the exclusive right to copyright holders to authorize the rental of copies with respect to all copyright works and other subject of copyright with limited exceptions (i.e. it does not

distribution,³⁰ the creation of new access control rights,³¹ and the less than certain application of exhaustion or first sale doctrine to digital copies distributed online with no physical supporting medium³² are examples of copyright holders' exclusionary powers that directly interfere with copy owners' powers and privileges beyond the traditional right to control the reproduction of works and their performance in public.³³ The distinction between the exclusive rental or distribution right and other exclusive rights is disappearing when works are embedded in digital copies. Because of the ease with which other copyright reserved acts can be performed on digital copies of copyright works, restrictions on the right to reproduce, or on the ability to make the digital copies available to the public are becoming as intrusive on the property rights of the digital copy owner as restrictions on the right to transfer or rent the digital copy.

In principle, consumers' powers and privileges in relation to commercial copies of copyright works should allow consumers to perform any act that is not exclusively reserved to copyright holders,³⁴ unless it has been authorized or falls under one of the exceptions to copyright infringement.³⁵ For example, consumers can read, listen to, view, or play a book, music CD, film DVD, or computer program for as often as they please. Consumers can play the music CD as part of a performance or

apply to buildings and to works of applied art). The Directive repeals EC, *Council Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property*, [1992] OJ L 346/61, which already provided for the application of the exclusive rental right to a similar broad range of copyright works and other subject matter of copyright.

³⁰ *CCA*, *supra* note 4, s 27.1; s 3 (j), introduced by the entry into force of the *CCMA*, *supra* note 9 in 2012, confers the exclusive right to copyright holders "in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner." See also the discussion on the distribution right and its exhaustion or first sale doctrine in Chapter 3 Part II F and Chapter 7 Part III A (ii).

³¹ *CCA*, *supra* note 4, ss. 41.1-41.21, introduced by the entry into force of the *CCMA*, *supra* note 9. For a discussion on TPMs see Chapter 3 Part III B.

³² See the discussion in Chapter 3 Part II F, Chapter 7 Part III A (ii) and Chapter 8 Part III.

³³ For instance, the rental right involves no copy being made of copyright works and is closely associated with the right to transfer the copy of the work, which through the application of exhaustion or the first sale doctrine is within the exclusive domain of copy owners: see the discussion on the exhaustion or first sale doctrine in Chapter 3 Part II F, Chapter 7 Part III A (ii) and Chapter 8 Part III.

³⁴ I.e. the exclusive right to produce or reproduce the work, to communicate it to the public, to perform it in public, to rent computer programs and musical recordings, to authorize the first sale of each copy of copyright works: *CCA*, *supra* note 4, ss 3, 15, 18, 21, 26.

³⁵ Liu, "Owning Digital Copies," *supra* note 3 at 1287 notes, regarding the unlimited ability to read copies of copyright works (in a US context): "The legal 'source' of this unlimited ability to read, to the extent there is one, can be found in the gaps in the Copyright Act. Section 106 of the Act, as several commentators have noted, does not include in the bundle of copyright rights the right to control the reading of a given copy." I discuss the copyright holders' exclusive rights and how they interact with exceptions to copyright infringement that are relevant to copyright consumers in Chapter 3 Part II.

skit in the privacy of their home, can mark the commercial copies of copyright works with their name, can restore them,³⁶ or can lend the copies to friends. All these acts are not exclusively reserved to copyright holders and should therefore be part of the open-ended powers and privileges of copy owners.

The traditional open-ended privileges and powers to play, view, listen to, or read commercial copies of copyright works, particularly when distributed online with no physical supporting medium, is under increased pressure due to the combination of various factors.³⁷ An expansionist view of copyright, i.e., one under which copyright holders' exclusive powers and privileges should allow them to control access and uses of their works in their entirety,³⁸ is supported by the erroneous assumption that copyright holders *own* their works.³⁹ As I discussed in Chapter 5, property law and theory inform us that copyright holders do not own their work, but rather the bundle of exclusive rights as they relate to the work as materialized.⁴⁰ I will address the specific issue of the justifications behind safeguarding the unlimited powers and privileges to read, view, listen, to or play a copy of a copyright work in Chapter 7.⁴¹

The amendments to the *CCA* in 2012 allow consumers and other users to perform more acts than before without the authorization of copyright holders, expanding their powers and privileges in relation to copies of copyright works.⁴² For example, under the *CCA*,⁴³ consumers cannot make copies of the musical recording, book, or film unless they are for private purposes and fulfill the other requirements of the reproduction for private purposes exception to copyright infringement.⁴⁴

³⁶ Copy owners have rights to make modifications and repair at common law: David Vaver, *Intellectual Property Law Copyright, Patents, Trade-Marks*, 2d ed. (Toronto: Irwin Law, 2011) [Vaver 2011] at 219- 220.

³⁷ Those factors include the scope of the exclusive right to authorize the reproduction of a work, the effect of technological protection measures and of non-negotiated standard end-user agreements for commercial copies of copyright works. See the discussion in Chapter 3 Part III B and III C, and the uncertainty around the characterization of those transactions as sales, licences or service contracts: see the discussion in Chapter 8 Part II.

³⁸ See the discussion in Chapter 2 Part III.

³⁹ See the discussion in Chapter 5 Part III and Part IV A (i).

⁴⁰ See the discussion in Chapter 5 Part IV A (i).

⁴¹ See the discussion in Chapter 7 Part III A (iii).

⁴² See the discussion in Chapter 3 Part II C and in Part II D.

⁴³ *CCA*, *supra* note 4, add reference to section.

⁴⁴ *Ibid*, s 28.22. See the discussion on the scope of the reproduction for private purposes exception in Chapter 3 Part II D (ii).

Consumers may be able to reproduce the copyright work under the fair dealing provisions if it is for one of the specified purposes and if the dealing is fair.⁴⁵ Consumers can perform a broad range of reserved acts with respect to existing works for the purpose of creating new works if they fulfill the requirements of the non-commercial user-generated-content exception to copyright infringement.⁴⁶ While consumers can perform more acts on commercial copies of copyright works that they own than before, certain exceptions to copyright infringement can specifically be overridden by contract or by the application of technological protection measures (TPMs).⁴⁷ For the other exceptions to copyright infringement, it is not clear whether they can be overridden by contract (i.e., their mandatory nature is not clear) even by non-negotiated standard end-user agreements.⁴⁸

There are still many acts that consumers cannot perform with the commercial copies of copyright works they own. For example, consumers cannot play the music CD or film DVD in public,⁴⁹ including at a neighbourhood fair,⁵⁰ at a wedding, during a public performance in a park, or at the corner store where they work part-time, without obtaining the authorization of the copyright holders or paying royalties to the relevant copyright collective body.⁵¹ Consumers cannot create derivative works from the work, telecommunicate to the public any substantial portion of their book, musical recording, or film, including posting it on Facebook, YouTube, or on their personal website, without the prior consent of the copyright holders, or unless it falls under one of the exceptions to copyright infringement;⁵² and the list goes on and on.

The ability to generate revenues from commercial copies of copyright works is one of the most constrained powers and privileges on the ownership spectrum. Although acts performed on copies of

⁴⁵ *Ibid*, ss 29 to 29.2. See the discussion on fair dealing in Chapter 3 Part II C.

⁴⁶ *Ibid*, s 29.21. See the discussion on the non-commercial user-generated content in Chapter 3 Part II D (i).

⁴⁷ For example, this is the case of the reproduction for private purposes exception to copyright infringement (CCA, *supra* note 4 s 29.22) and in the case of the later listening or viewing exception to copyright infringement (s 29.33).

⁴⁸ See the discussion in Chapter 3 Part IV.

⁴⁹ However, they can recite in public “a reasonable extract from a published work”: CCA, *supra* note 4, s.32.2(d).

⁵⁰ Unless the use would fall under one of the limited exceptions to copyright infringement for Educational institutions: sections. 29.4 to 30 of the CCA, *supra* note 4.

⁵¹ Either directly or through the relevant collective agency that is administered by the Copyright Board under the CCA, *supra* note 4.

⁵² I discuss the relevant exceptions to copyright infringement for consumers in Chapter 3 Part II.

copyright works do not necessarily need a commercial purpose to constitute copyright infringement, the commercial character of the use will bar or lessen consumers' or other users' ability to invoke exceptions to copyright infringement.⁵³ There are exceptions: for example, in Canada, users can rent out the commercial copies of copyright works they own, except for computer programs and sound recordings embedding musical recordings.⁵⁴ The various restrictions of the acts that consumers can perform on the commercial copies of copyright works they own operate, without a doubt, as limitations on their *prima facie* open-ended privileges and powers.

The restrictions imposed by copyright on commercial copies of copyright works go to the heart of the open-ended privileges and powers of consumers. Two examples illustrate that point for our discussion purposes: a laptop not protected by any relevant intellectual property right and an electronic book for which the copyright has expired after purchase.⁵⁵ As owners of the laptop, consumers can photograph it, use it in a film, lend it or sell it to a friend, use it for or incorporate it in an art work, bring it to their family business and use it in a profit-driven activity. They can even start a new line of business by making similar laptops.⁵⁶ For all these activities, consumers do not need to ask permission of the suppliers or sellers of the laptop, nor is it written in any contract that they are allowed to do these things. As owners of a laptop, they have the power and privilege to perform all these acts, as well as an open-ended list of other uses. In the second example, compare an electronic book protected by copyright with an electronic book in which all copyright has expired after the copy was purchased. In the latter case, consumers can make as many copies as they wish for time- or space-shifting purposes, give it to friends, or post it on the Internet. They can convert it into a play or reproduce substantial parts and incorporate it in other works. All these acts would be restrained if the copyright had not expired.⁵⁷ Once again, the list of powers and privileges is open-ended and consumers do not need to ask permission of anyone, nor is there any contract that tells them that they can perform all of these

⁵³ This is one of the factors to consider (although not determinant) to assess whether the dealing in a work is fair under the fair dealing provisions (see the discussion on the scope of fair dealing in Chapter 3 Part II C), the commercial character of the acts performed on a work is a bar to the application of the non-commercial user-generated content exception to copyright infringement (*CCA*, *supra* note 4, s 29.21).

⁵⁴ *CCA*, *supra* note 4 s 3(1) (h)-(i).

⁵⁵ The lap top would most likely bear a trade-mark. It may or may not be protected by an industrial design or patent.

⁵⁶ Except for the trade-mark under which the lap top is sold and subject to applicable patents or industrial designs. This last example takes us outside the realm of our discussion centered on the consumer.

⁵⁷ Subject to the application of specific limitations to the exclusive rights of copyright holders, including fair dealing.

acts. They simply can, as owners or possessors of the copy of the electronic book, *in which copyright has expired*.

The open-ended powers and privileges to transfer the rights or otherwise dispose of commercial copies of copyright works are increasingly under threat. Traditionally, consumers can sell, donate, otherwise dispose of, or destroy their commercial copies of copyright works as embedded in a physical object (a book, a CD, a DVD). However, contract terms restraining consumers' and other users' ability to transfer or assign their commercial copies of copyright works have been held valid in spite of the exhaustion or first sale doctrine; the application is even less certain when digital copies are distributed on line with no physical supporting medium.⁵⁸ As a result, the ability of consumers to transfer and assign their commercial copies of copyright works, one of the fundamental open-ended powers and privileges on the ownership spectrum, is also under threat.

In the case of commercial copies of copyright works, the second feature on the ownership spectrum by which the powers and privileges on the resource are open-ended is much more constrained than most other forms of personal property.⁵⁹ The somewhat fastidious review conducted here of open-ended powers and privileges and the limitation thereto reveals that the restrictions on commercial copies of copyright works are substantial and increasingly so. I will now examine the extent to which the privileges and powers related to commercial copies of copyright works authorize consumers' self-seekingness.

(iii) Privileges and powers that authorize self-seekingness to the owner

The third feature common to all ownership interests on the ownership spectrum is that the privileges and powers that a person has in the resource confers privileges and powers that authorize self-seekingness to the owner.⁶⁰ *Self-seekingness* is the intimate relationship between the owner and the

⁵⁸ See the discussion on the exhaustion or first sale doctrine in Chapter 3 Part II F, Chapter 7 Part III A (ii) and Chapter 8 Part III.

⁵⁹ As Cohen, "Does Copyright Trump Privacy?", *supra* note 11 at 378, notes: "The expansion is particularly dramatic in the case of things embodying works, and not just because the bundle of rights conferred by copyright is particularly limited to start with. Conditions imposed on would-be users of things embodying copyright works far outstrip any conditions imposed on would-be users of other kinds of things."

⁶⁰ Harris, *supra* note 1 at 5.

resource as to how the owner chooses to dispose of the resource, with *prima facie* no duty to account to any one about the merit or rationality of that preference.⁶¹

The self-seekingness component common to all ownership interests is particularly significant for consumers of commercial copies of copyright works. By definition, consumers perform acts within their personal and intimate sphere of interest and not for business purposes.⁶² On that terrain, the constraints on consumers' open-ended powers and privileges have repercussions on the extent to which the commercial copies of copyright works they own authorize self-seekingness.⁶³ The limitations on consumers' open-ended powers and privileges related to the commercial copies of copyright works they own are not trivial: they go to the heart of the uses that consumers increasingly want to make of copyright works.⁶⁴ They directly and materially impede on the *prima facie* self-seekingness that ownership in copies of copyright works should entail.⁶⁵ The situation is here reversed: consumers are, to a large extent, *a priori* banned from the self-seekingness aspect of their property rights in the commercial copies of the copyright works they own. As a corollary to the important limitations on consumers' open-ended powers and privileges, the commercial copies of copyright works they own ability to authorize self-seekingness is also compromised in comparison to other forms of personal property.

To sum up on the property attributes of commercial copies of copyright works, I started my analysis on the premise that unlike copyright, the personal property nature of commercial copies of copyright works was not controversial. My application of property law and theory to commercial copies of copyright works reveals that we need to rethink the fundamental assumption that commercial copies

⁶¹ *Ibid* at 65.

⁶² See my discussion on the specificity of consumers amongst the larger group of users in Chapter 2 Part IV.

⁶³ See the discussion on the restrictions to consumers' open-ended powers and privileges to commercial copies of copyright works in Part VI B (ii).

⁶⁴ For a review of consumer uses and expectations of copyright works, see for example the report: Center for Democracy & Technology, "Evaluating DRM: Building a Marketplace for the Convergent World" (2006) at 7-8, online: <http://www.cdt.org/copyright/20060907drm.pdf>; see also Pamela Samuelson & Jason Schultz, "Should copyright owners have to give notice of their use of technical protection measures?" (2007) 6 J. Telecomm. & High Tech. L. 41 at 44-45.

⁶⁵ Joseph P. Liu, "Copyright Law's Theory of the Consumer" (2003) 44 Boston College Law Review, 397 [Liu, "Copyright Law's Theory of the Consumer"] at 412, refers to copyright works as not only being individual consumer goods but as also being social goods: "... to make sense of and interpret many copyright works meaningfully, it is sometimes necessary to communicate with others about the works; to share viewpoints, to debate, and to argue. Although some works can certainly be consumed alone, by an individual consumer, many

of copyright works are personal property in some cases and, at best, realize that their location on the ownership spectrum is progressively weakening.

Commercial copies of copyright works generally confer trespassory powers on consumers similar to other forms of personal property and the legal relationship between a person and a resource (and the identification and separateness between the two) is fulfilled.⁶⁶ However, the open-ended powers and privileges and self-seekingness that commercial copies of copyright works authorize are increasingly compromised, up to a point that, in some cases, ownership itself is put in question.⁶⁷ The amendments to the *CCA* in 2012 allow consumers to perform more acts on the commercial copies of copyright works they own without the authorization of copyright holders than they were previously able to perform. However, the newly introduced permitted acts, framed as exceptions to copyright infringements, are subject to the fulfillment of strict conditions and are, in some cases, explicitly subject to contract clauses or TPMs overriding the permitted use while their mandatory nature remains uncertain in the other cases.⁶⁸ More fundamentally, the ability to assign and transfer the personal property without any duty to account to anyone is sometimes restricted through contract terms that have been upheld by the courts.⁶⁹ The uncertain application of the exhaustion or first sale doctrine, especially to commercial copies of copyright works distributed online with no supporting physical object, directly relates to the validity of commercial practices restraining consumers' privilege and power to assign or transfer the commercial copies of copyright works that they lawfully acquired.⁷⁰ As consumers are deprived of the ability to transfer and assign the commercial copies they lawfully acquired, consumers' rights thereto resemble more a dismemberment of ownership than to

works are suited to social consumption. The ability to communicate about copyright works enriches our understanding of those works and enables us to get much more out of them."

⁶⁶ See the discussion in Part II B (i) of this chapter.

⁶⁷ See the discussion in Part II B (ii) and (iii) of this chapter.

⁶⁸ For example, this is the case of the reproduction for private purposes exception to copyright infringement (*CCA*, *supra* note 4 s 29.22) and in the case of the later listening or viewing exception to copyright infringement (s 29.33). See the discussion in Chapter 3 Part IV.

⁶⁹ See the discussion in Chapter 7 Part IV and in Chapter 8 Part II C on the treatment of contractual clauses that restrict the right to transfer commercial copies of copyright works lawfully acquired for an indefinite duration, other than in the case of rental agreements where such restrictions would be expected.

⁷⁰ See the discussion on the exhaustion or first sale doctrine in Chapter 3 Part II F, Chapter 7 Part III A (ii) and Chapter 8 Part III.

ownership itself. Even then, it may not fall within the characteristics of any known form of property interest.⁷¹

Ownership in resources, including chattels, is a hard-wired concept that goes back through time immemorial.⁷² The *décalage* between what consumers of commercial copies of copyright works should own *a priori*, through the application of property law and theory, and what they own in reality or may even not own anymore,⁷³ can explain to a large extent the growing incredulity or disbelief that even well-informed consumers have with respect to what they are entitled and not entitled to do with their commercial copies of copyright works. As methods of exploitation evolve toward the online distribution of copies of copyright works with no supporting physical object, the meaning of ownership – as opposed to no ownership – and the degree of privileges that it entails are even more critical questions than they ever were before.⁷⁴

Unlike other forms of property, whereby the exclusionary powers associated with ownership mean that the owner has the power to set the agenda,⁷⁵ with respect to the ownership in copies of copyright works, we have come to accept that this agenda is to be almost exclusively set by the copyright holder. As we have entered a new copyright era whereby copyright work access controls merge with the control of acts reserved to copyright holders, there is a double standard on the forms of intrusions

⁷¹ Art 1119 CCQ. Dismemberments of ownership, e.g. usufruct, servitudes or easements are known forms of property interests. In the case of lawfully acquired copies of copyright works for an indefinite duration with no right to transfer or assign the copy, the copies are deprived of an essential attribute of ownership. They may not fall under the traditional dismemberments of ownership either, such as usufruct, given the considerable other restrictions attached to the copies through the other restrictions of copyright.

⁷² Harris, *supra* note 1 at 4; in the context of the significance of our understanding of conventional property to justify the ownership of digital copies of copyright works, Liu, “Owning Digital Copies,” *supra* note 3 at 1300 states: “as a purely descriptive matter, the incidents of copy ownership can be explained as having arisen from conventional and deeply embedded understandings about what it means to own or to possess physical personal property.”

⁷³ That is in the case of copies distributed online, as a result of the applicable online terms and conditions.

⁷⁴ For instance, as I discuss in Chapter 7, the first sale or exhaustion doctrine, which normally allow copy owners to subsequently transfer their copies of copyright works without the authorization of copyright holders does not apply with respect to such digital copies distributed online.

⁷⁵ Larissa Katz, “Exclusion and Exclusivity in Property Law” (2008) 58 U of Toronto Law Journal 275 at 277-278, whereby the author presents a narrower view of the power to exclude resulting from ownership, i.e.: “What it means for ownership to be exclusive is just that owners are in a special position to set the agenda for a resource.”

that are acceptable to consumers *versus* the ones that are acceptable on copyright holders' exclusive rights.⁷⁶

For the purposes of our discussion, we need to ask, with respect to the phenomena leading up to the potential eradication of copy ownership: are there freedoms (ranges of autonomous choices) that would not exist without the property in the copy? Without these freedoms, would the copyright system treat consumers fairly, and would it still be coherent with its theoretical justifications? In instances where the ownership in the copy subsists, what is the proper scope of ownership and how can it legitimately be limited by the exclusive rights of the copyright holder? The impact of various justificatory theories of private property on copies of copyright works, as well as the operation of copyright as a limitation on consumers' ownership rights in copies of copyright works, are considered below in this chapter in an attempt to answer these pressing questions. Prior to that, I will look into the implications of the *numerus clausus* principle to commercial copies of copyright works, as another important attribute of the property institution.

C. Commercial copies of copyright works and the standardization of property

The standardization of property or the *numerus clausus* principle, by which there is a fixed and closed list of property interests recognized by law and, as one corollary, limitations on how owners can alter the nature of their property rights, is another distinctive feature of property.⁷⁷ In Chapter 4, I discussed how I intend to apply the *numerus clausus* principle to define copyright consumers' rights, i.e., as a tool to calibrate the effects of the property regime created by the CCA and copyright holders' freedom of contract.⁷⁸

Commercial copies of copyright works do not fare so well on the terrain of the *numerus clausus* principle compared to other forms of property, and arguably, even less so than copyright.⁷⁹ On the one hand, to the extent that commercial copies of copyright works qualify as personal property, the

⁷⁶ Cohen, "Does Copyright Trump Privacy?", *supra* note 11 at 380 refers to the legal endorsement of digital rights management as applied by copyright holders as being viewed as acceptable forms of intrusion on consumers' rights in copies of copyright works on the one hand, in contrast with consumer activities related to information products (such as use of automated software for comparative pricing) as being condemned on various legal bases, on the other hand.

⁷⁷ See the discussion on the standardization of property in Chapter 4 Part III.

⁷⁸ *Ibid.*

⁷⁹ See the discussion on the application of the *numerus clausus* principle to copyright in Chapter 5 Part IV C.

limitations imposed on the open-ended powers and privileges of consumers by copyright holders' limited non-ownership proprietary interest in the commercial copies are not a derogation from the *numerus clausus* principle, but rather an illustration of the flexibility of the property institution and of the endless variations of ownership interests on the ownership spectrum. In the same vein, the progressive expansion of copyright holders' exclusive rights,⁸⁰ and with it of their non-ownership proprietary interest in commercial copies of copyright works,⁸¹ can be perceived as moving commercial copies of copyright works further down on the ownership spectrum without taking them out of the property institution by creating a unknown form of property interest.

On the other hand, commercial copies of copyright works may be outliers to the *numerus clausus* principle in other important respects. The complex relationship between the exclusive rights of copyright holders and the ownership rights of consumers to commercial copies of copyright works may lead the judiciary to misinterpret the scope of copyright holders non-ownership proprietary interests in commercial copies of copyright works, leading to greater discrepancies in the homogeneity of the rights pertaining to commercial copies of copyright works than with respect to other forms of personal property.⁸² An even more troublesome aspect of the conformity of commercial copies of copyright works to the *numerus clausus* principle concerns copyright holders' widespread licensing practices by which they restrict consumers' and other users' rights to assign and transfer copies of copyright works.⁸³ To the extent that these contractual rights are being enforced, the restriction of the power to alienate potentially disqualifies commercial copies of copyright works from being personal property.⁸⁴ Similarly, the non-applicability of the exhaustion doctrine to digital copies of copyright works distributed online with no hand-to-hand exchange has the same effect.⁸⁵ The restriction on the power to alienate creates a new form of property interest that more resembles a dismemberment of ownership, but which may still create an unknown proprietary interest in the property institution, which is precisely what the *numerus clausus* principle seeks to guard against.

⁸⁰ See the discussion in Chapter 5 Part II.

⁸¹ See the discussion in Chapter 5 Part IV B.

⁸² For example, see the discussion on the difficulty for courts to qualify the nature of commercial copies of copyright works because of the confusion between the exclusive rights of copyright holders and of the owners of commercial copies of copyright works in Chapter 8 Part II.

⁸³ See the discussion in Chapter 7 Part IV.

⁸⁴ See the discussion in Part II B *in fine* of this chapter.

⁸⁵ See the discussion on the exhaustion or first sale doctrine in Chapter 3 Part II F and in Chapter 7 Part II A (ii).

To the extent that commercial copies of copyright works are a form of personal property, the proper question to answer is why commercial copies of copyright works need to comply as much as possible with the *numerus clausus* principle as a guiding norm for the judiciary, law- and policy-makers.⁸⁶ To what extent are the concerns favouring the standardization of property with respect to other forms of personal property similar with respect to commercial copies of copyright works? I will explore this question further in Chapter 7 as I apply the *numerus clausus* principle to commercial copies of copyright works as a tool to mediate between the property rights conferred on copyright holders by the CCA and their ability to alter those rights by contract.⁸⁷

The discussions in Chapter 5 on the nature of copyright and in this chapter on the uncertain legal nature of commercial copies of copyright works illustrate a struggle between competing interests and progressive encroachments on the ownership interests of copyright consumers. How did we get here and can we justify this evolution? In the remainder of this chapter, I will apply influential property theories to commercial copies of copyright and to copyright in search of answers to these fundamental questions.

III. Justificatory theories of (intellectual) property and of copy ownership

The justification of the scope of ownership in commercial copies of copyright works is under-theorized, just as is the case for its nature.⁸⁸ By contrast, literature abounds on the theoretical justifications of copyright.⁸⁹ As Jeremy Waldron noted when looking at copyright from the

⁸⁶ I discuss the justifications for the application of the *numerus clausus* principle in Chapter 4 Part IV.

⁸⁷ See the discussion in Chapter 7 Part IV.

⁸⁸ See the discussion in Part II A of this chapter.

⁸⁹ See for example Edwin C. Hettinger, "Justifying Intellectual Property" (1989) 18 *Philosophy & Public Affairs*, 31, in David Vaver, ed., *Intellectual Property Rights, Critical Concepts in Law* (London: Routledge, 2006) Vol.I, 97; Jeremy Waldron, "From Authors to Copiers: Individual Rights & Social Values in Intellectual Property" (1993) 69 *Chicago-Kent Law Review*, 841, in David Vaver, ed., *Intellectual Property Rights, Critical Concepts in Law* (London: Routledge, 2006) Vol.I, 114 [Waldron, "From Authors to Copiers"]; William W. Fisher, "Theories of Intellectual Property" in Stephen R. Munzer (ed) *New Essays in the legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001) 168 ; Peter Drahos, *A Philosophy of Intellectual Property* (Aldeshot: Ashgate, 1996); Sunny Handa, *Copyright Law in Canada*, (Markham, Ont: Butterworth Canada, 2002) at 59-134; Carys J. Craig, "Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law" (2002) 28 *Queen's L.J.* 1; Samuel E. Trosow, "The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital" (2003) 16 *Can. J.L. & Juris.* 217; Brian F. Fitzgerald, "Theoretical Underpinning of Intellectual Property: I am a Pragmatist But

perspective of users and copiers: “We cannot unravel conundrums of moral justification unless we are willing to approach the issue even-handedly from both sides.”⁹⁰ It is beyond the scope and purpose of this chapter to provide a detailed review of the body of academic work on the theoretical justifications of property and, more particularly, of copyright.⁹¹ After starting with the normative status of *prima facie* open-ended freedoms reflected in the concept of ownership, and its ramifications to justify the scope of ownership in commercial copies of copyright works, I will then look at two other prevailing underlying theories of property and copyright. First, I review instrumental theories as they relate to copyright and commercial copies of copyright works. Instrumental theories are the most influential justifications for the existence of private property in general,⁹² and copyright in particular.⁹³ Looking at the underlying instrumental theories to justify copyright provides a reference point to assess the application of property rules to the ownership in commercial copies of copyright works, to support or

Theory is my Rhetoric” (2003) 16 Can. J.L. & Juris. 179; Abraham Drassinower, “A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law (2003) 16 Can. J.L. & Juris. 3; William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge: Mass Bellnap Press, 2003); Richard A. Posner, “The Law and Economics of Intellectual Property” (2002) *Daedalus* 5; Richard Polk Wagner, “Information Wants to be Free, Intellectual Property and the Mythologies of Control” (2003) 103 *Columbia Law Review* 995; David Lametti, “Coming to Terms with Copyright”, in Michael Geist (ed) *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 480; Mark A. Lemley, “Property, Intellectual Property and Free Riding” (2005) *Texas L. Rev.* 1031; Karla M. O'Regan, “Downloading Personhood: A Hegelian Theory of Copyright Law” (2009) 7 *Can. J. L. & Tech.* 1; Giuseppina D'Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (Cheltenham: Edward Elgar, 2010) at 201-259.

⁹⁰ Waldron, “From Authors to Copiers”, *supra* note 89 at 114.

⁹¹ Among the several justificatory theories of property that are not discussed here are the first occupancy theory, personhood constituting theory, for example as developed in the work of Margaret Jane Radin: Margaret Jane Radin, “Property and Personhood” (1982) 34 *Stan. LR* 957, and sovereignty theories. With respect to copyright in particular, personality-based theories are frequently invoked to justify the creation of private property rights through copyright. (For a survey of theoretical justifications of intellectual property, in particular personality based theories see Fisher, *supra* note 89 at 171-172, 174 and 189-192.) They also include notions of freedom and autonomy. Personality-based theories have a strong resonance to justify the existence of moral rights. Their inalienability gives strength to the argument that they are founded on personality-based theories although the justification of moral rights in Canada could be based on utilitarian grounds, see Handa, *supra* note 89 at 128-130. Personality-based theories can also be invoked to justify the exclusive right of the individual author to authorize the first publication of her work. Once the work is published, personhood arguments to justify copyright exclusive rights are less than certain (for example, see Waldron, “From Authors to Copiers”, *supra* note 89 at 137, where the author concludes that it is a mistake to generalize beyond the first right to publish that a copier's actions compromise the liberty of the author whose work she is using. See the discussion further below in Part III of this chapter on my motivations for focussing on specific theoretical justifications of property and copyright.

⁹² Waldron, *The right to private property* (Oxford: Clarendon Press, 1988) [Waldron, “Private Property”] at 3.

⁹³ Namely under the US Const art I, s 8, Congress's power with respect to copyright (and patents) is “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; see also Fisher, *supra* note 89 at 169, 173. In other common law jurisdictions: Handa, *supra* note 89 at 75. See also Harris, *supra* note 1 at 296, who views the instrumental justification of creator- incentive as the only plausible justification for intellectual property.

criticize the current scope of copyright, and to highlight important departures from its presumed prevailing theoretical justifications. Second, I will discuss the fruits of one's labour theory – another influential natural law theoretical justification of copyright – and how it affects our conceptions of ownership in commercial copies of copyright works. The recourse to various theories of property and copyright points to the lack of a coherent and uniformly applied justification. In the case of copyright, seemingly contradictory justificatory theories play a central role in how the courts, lawmakers, scholars, and interest groups characterize the exclusive rights conferred on copyright holders.⁹⁴

The deliberate selection of theoretical justifications of (intellectual) property is driven by the scope of inquiry of my research. First and foremost, I concentrate my analysis on theories that are either relevant to justify, or that are likely to be influential in determining the scope of ownership of commercial copies of copyright works as personal property, not copyright *per se*. Because of the close connection between copyright consumers' rights in the copies and copyright holders' exclusive rights in the works,⁹⁵ I will apply each theory with reference to its implications for the rights of consumers and copyright holders. Given the focus of my thesis on commercial copies of copyright works in a mass-market environment, I am also interested in those theories that are more apt to explain the dynamics of the exploitation phase of copyright works. In the case of musical works, films, and books, we are concerned with the proper justifications of copyright after the copyright work is commercialized. When consumers access the copyright works, the exclusive right to authorize first

⁹⁴ The *CCA*, *supra* note 4, generally exemplifies an instrumentalist approach to copyright (e.g., section 13 (3) states that the first owner of copyright is the employer of the author who created the work in the course of her employment) but also includes rights that can be justified by personality-based theories (e.g. moral rights: ss 14.1-14.2) and clauses that illustrate both justifications (s 83 which provides for the reversion of copyright to the author in case of bankruptcy, which can be justified by instrumentalist theories as well as personality-based theories). In *Théberge v Galerie d'art du petit Champlain Inc.*, 2002 SCC 34 [*Théberge*] at para 30, the judgment for the majority seems to found the justifications of copyright on a combination of instrumental and natural property rights in the fruits of one's labour theories: "The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)". In *BMG Canada v John Doe*, 2005 FCA 193 at para 40, the Federal Court of Appeal adopts a utilitarian approach to copyright while resorting to Lockean fruits of one's labour theory language. The various theoretical justifications seem to co-exist in the European Union harmonization efforts of copyright. See for example EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, [2001] OJ, L167/10, Preamble which point to utilitarian justifications (recital 4) fruits of one's labour theory (e.g. recital 10) and personality-based theories (e.g. recital 11). For a US perspective, see an analysis of the justificatory theories reflected in American copyright and intellectual property case law in Fisher, *supra* note 89 at 168; see also Adam Mossoff, "Is copyright property?" (2005) 42 San Diego Law Review, 29 at 36.

publication that is part of the bundle of copyright exclusive rights, which give rise to distinct theoretical justifications,⁹⁶ has already taken place. I am also dealing with multiple commercial copies of copyright works as opposed to instances where there exists only one original of the copyright work, a situation that brings other considerations to determine the scope of ownership of commercial copies of copyright works.⁹⁷ I begin my analysis with the theoretical justification that can help define the proper scope of ownership of commercial copies of copyright based on Harris's theory of the *prima facie* normative status of all ownership freedoms.⁹⁸

A. The *prima facie* normative status of all ownership freedoms

Central to Harris's theory of property, as the incarnation of freedom and autonomous choice, is the ubiquitous manifestation in society of a wide spectrum of ownership interests. Ownership is an "organizing idea" in which all of these interests share to various degrees, open-ended privileges, powers, and self-seekingness.⁹⁹ To invoke freedom as a moral justification for maintaining a property institution, one needs to ask "whether inherent property freedoms are a necessary feature of the just society."¹⁰⁰ The proposition is that, quite apart from instrumental reasons, "property institutions by their very nature confer freedoms (ranges for autonomous choice) which would not exist without them; and for this reason no citizen is treated justly by his community unless it institutes or maintains a property institution."¹⁰¹ Hence, open-ended uses and privileges nurture freedoms that contribute to autonomous choice and *prima facie* justify property institutions.¹⁰² Harris arrives at this conclusion by finding no convincing argument that any of the powers and privileges on the ownership spectrum

⁹⁵ See the discussion in Chapter 5 Part IV B.

⁹⁶ See Handa, *supra* note 89 at 125-126 where the author suggests approaching copyright in two phases to apply coherent theoretical justifications. The first right to publish would be justified on the basis of privacy, while the exploitation right after publication has occurred would be justified by a social utility model.

⁹⁷ This would be the case of a unique painting, statue or architectural work. In such cases, the interaction between the property rights of the owner of the physical copy and the author is likely to be greater than in the case of commercial copies of a music CD or a film DVD, and raises distinct issues that are beyond the scope of my research.

⁹⁸ Harris, *supra* note 1.

⁹⁹ *Ibid* at 63ff.

¹⁰⁰ *Ibid* at 231.

¹⁰¹ *Ibid* at 230. James O. Grunebaum, *Private Ownership* (London, New York: Routledge & Kegan Paul, 1987) at 183, bases the moral justification of ownership in autonomy and develops a theory of "autonomous ownership". Within that framework, Grunebaum acknowledges how use controls of consumer goods violate autonomy: "Community control over consumer goods, either in the form of what goods are produced or control in the form of what uses consumer products may be put to, would violate autonomy."

should be *a priori* excluded from the concept of ownership: “the spectrum has evolved in human history and is available within property institutions as a means of conferring ranges of autonomous choice on individuals or groups.”¹⁰³ *A contrario*, if there were no property-specific justice reasons to support those freedoms, “countless day-to-day unquestioned assumptions about people being free to do what they like with their own things and their own money would turn out to be morally suspect.”¹⁰⁴ Autonomy is a value frequently invoked to justify property and, more particularly, personal property.¹⁰⁵

Based on the premise that there is no natural right to full-blooded ownership, none of these freedoms is sacrosanct, and they all may be overridden by justifiable property-limitation and expropriation rules, which are also widely observed and accepted in modern societies.¹⁰⁶ Although Harris’s theory of a right to property based on freedoms, and derived from Hegel’s theory of property,¹⁰⁷ unequivocally rejects a natural right to full-blooded ownership, it may rejoin what Jeremy Waldron would call a “general right-based argument” to property (as opposed to a “special right-based argument”).¹⁰⁸

The *prima facie* normative status of ownership freedoms is central to the justification of ownership in commercial copies of copyright works in at least two cases: with respect to the threat to eradicate

¹⁰² Harris, *supra* note 1 at 231.

¹⁰³ *Ibid* at 275.

¹⁰⁴ *Ibid* at 65. See also Grunebaum, *supra* note 101.

¹⁰⁵ For example see Grunebaum, *supra* note 101 at 183: “The idea that autonomy requires a wide range of rights of title over consumer goods implies that so called consumer sovereignty is a moral as well as the economic requirement to maintain the value of income and to achieve or measure efficiency. That consumers legitimately exercise a wide range of rights of title over goods for personal consumption applies not only to what they actually purchase but to what is available for their purchase. Not only should individuals be able to exercise a broad range of rights of title over their living quarters, for example, but they should also have a wide range of options about the kinds of living quarters made available.”

¹⁰⁶ Harris, *supra* note 1 at 275.

¹⁰⁷ Harris develops his property justification based on freedom mainly from the analysis of Hegel’s theory: Harris, *supra* note 1 at 230ff.

¹⁰⁸ Waldron, “Private Property”, *supra* note 92 at 116, defines the two concepts as follows: “A special-right-based argument... is an argument which takes an interest to have this importance not in itself but on account of the occurrence of some contingent event or transaction. A general-right-based argument ... is one which does not take the importance of such an interest to depend on the occurrence of some contingent event or transaction, but attributes that importance to the interest itself, in virtue of its qualitative character.” Waldron’s theory, based on Hegel, supports a general –right-based argument to property. He uses as an example of a special right- based argument John Locke’s natural right theory of property that is based on labour-desert type of arguments. See also David Lametti, “Concept of Property: Relations through Objects of Social Wealth” (2003) 53 U. Toronto L.J. 325 at 356ff, who discusses Harris’s “right-based” theory.

copy ownership altogether and, where copy ownership subsists, as a baseline to analyze what the proper scope of copy ownership freedoms should be. On that terrain, commentators have invoked other theories, including human-rights-based arguments to preserve users' scope of use of copyright works, which will I will not review here.¹⁰⁹

On the threat to eradicate ownership in digital copies (through copyright holders' commercial practice of restricting consumers' rights to transfer and assign their copies, and through the confusion that subsists in the nature of digital copies of copyright works distributed online with no supporting physical medium),¹¹⁰ the questions to ask are: how can the property institution of copyright serve as a justification to *a priori* exclude the powers and privileges that relate to the ownership in commercial copies of copyright works? Is it just to allow a shift to take place from day-to-day unquestioned freedoms (albeit limited) by consumers as copy owners of a copyright work, to countless suspicion, monitoring, and control by copyright holders over the fate of their copyright works? Given the ubiquity and centrality of ownership as a vehicle for infinite and repetitive minuscule exercises of freedom in all spheres of consumption and modern life, allowing such a shift to take place through copyright holders' change of business practices, without any intervention from the authority which created the property right in the first place (i.e., the state, through copyright statutes), is at best suspicious.

Copyright holders justify their increased control over commercial copies particularly by restricting consumers' rights to assign and transfer commercial copies that they lawfully acquired on the basis of the need to combat piracy, which is a matter of legitimate concern. However, how much burden can copyright holders reasonably ask consumers to bear and how far can they impede consumers' legitimate freedom on that basis? Are these not too fundamental questions to be left to the will of copyright holders alone in how they exploit their copyright works by contract? The institution of intellectual property, as created by various statutes, is not self-justifying.¹¹¹ *A fortiori*, any further

¹⁰⁹ For example, see Julie E. Cohen, "A right to read anonymously: a closer look at "copyright management" In Cyberspace" (1997) 28 Conn. L. Rev. 981, makes an argument in favour of protecting users' right to read without intrusion from copyright holders that is based on the U.S. Constitution first amendment. Given the scope of my thesis on consumers lawfully accessing copies of copyright work, a property-based approach offers a more specific account of the rights at play: see the discussion in Chapter 4, in particular, Part I, II and VI.

¹¹⁰ See the discussion in Chapter 7 Part IV and in Chapter 8, in particular Part II.

¹¹¹ As Waldron puts it: "The fact is however, that whether or not we speak of a burden of proof, an institution like intellectual property is not self-justifying; we owe a justification to anyone who finds that he can move less

material limitations on consumers' and other users' freedoms should not be left to the will of the private interests of copyright holders alone, without a proper debate taking place and the democratic process taking its course.¹¹² Given the current void in the copyright system on the status of commercial copies of copyright works and the general legal uncertainty that results therefrom, copyright holders are able to create material changes about the ownership of commercial copies of copyright works and to effectively broaden the scope of their exclusive rights.¹¹³

In parallel to copyright holders exhorting more power and control over their works, in cases where ownership in the copy of the copyright work subsists, what is the normative force of these increasingly open-ended freedoms of consumers as new technologies empower them more than ever before in how they access and experience copyright works? The *prima facie* normative status of ownership freedoms brings a substantive argument to support and understand ownership in commercial copies of copyright works, both for its scope and its subsistence, and to situate copy ownership vis-à-vis the private property regime that is created by copyright.¹¹⁴ Various forms of property including personal property predate the existence of copyright and, therefore, it is one of the underlying assumptions, upon which copyright laws were created.¹¹⁵

Related to the normative value of freedom is privacy, which is also relevant in the debate about copyright holders' controls over the copies of their copyright works. Waldron arrives at a similar conclusion as Harris's *prima facie* normative force of all ownership freedoms on the basis of the right

freely than he would in the absence of the institution": Waldron, "From Authors to Copiers", *supra* note 89 at 146.

¹¹² On that point, see the discussion in Chapter 3 Part III and IV on the ambiguities of the interaction between copyright, contracts, TPMs and exceptions to copyright infringement.

¹¹³ On the debate on the effects of private contracts on the copyright system, see Chapter 3 Part III A.

¹¹⁴ Liu, "Copyright Law's Theory of the Consumer", *supra* note 65 at 406-411, invokes autonomy as one of the aspirations of consumers of copyright works, e.g., "freedom in choosing when, how, and under what circumstances to consume a copyright work". The Author acknowledges that the U.S. copyright law already recognizes a fair degree of autonomy of the consumer among others through the application of the fair use doctrine. For Liu, "the sale of a copy represents a fixed bundle of entitlements giving the purchaser the ability to exercise a good deal of autonomy in consumption.": *Ibid* at 408. More generally, on the fact that autonomy requires a wide range of rights of title over consumer goods, See, Grunebaum, *supra* note 101 at 183.

¹¹⁵ Liu, "Owning Digital Copies," *supra* note 3 at 1301, reflects on the place of the incidents of copy ownership within the copyright regime as follows: "Copyright law, then, does not so much expressly build in such incidents of copy ownership, as it accepts and assumes such incidents as given. That is, under this view, understandings about physical copy ownership antedate the relatively more recent development of copyright law." On a related idea, on the interaction between intellectual property and tangible property see Jeremy de Beer and Robert Tomkowicz, "Exhaustion of Intellectual Property Rights in Canada" (2009) 25 C.I.P.R. 3 at 20-24.

to privacy.¹¹⁶ For Waldron, if every resource was publicly controlled, every use of that resource by an individual would be an “other-regarding” action; we would be accountable to all and this would be untenable.¹¹⁷ This makes him conclude that: “there must be a realm of private freedom somewhere for each individual – an area where he can make decisions about what to do and how to do it, justifying these decisions if at all only to himself.”¹¹⁸ Perhaps that is so, precisely because privacy derives from the values of autonomy and freedom. It is a specific expectation, in certain circumstances, of a sacred space where these values can optimally flourish. Yet, for Harris, privacy plays a role distinct from freedom when it comes to justifying private property. For Harris, privacy can be the “shell” of a natural right to private property¹¹⁹ in very limited circumstances, when the intimate relationship that arises between a person and a thing is such that a just treatment would entail recognition of an ownership right in the resource.¹²⁰ One example of such a natural right would be the exclusive powers of an author on the right to authorize the first publication of her work on the basis of privacy.¹²¹

Privacy considerations (just like freedom and autonomous choice) have applications that go above and beyond justifying the existence of private property rights in a resource. It is one thing to say that, on the basis on privacy, the state will not enter the home of consumers or install cameras in public spaces to monitor their uses of copyright works.¹²² Privacy is often invoked as the justification for the private copy exception to copyright infringement that exists in several European jurisdictions.¹²³ This is a

¹¹⁶ Waldron, “Private Property”, *supra* note 92 at 295 and at 343ff, where the author develops a general right to property derived from Hegel’s theory of freedom and property.

¹¹⁷ *Ibid* at 295 [citing J.S. Mill; Mill, *On Liberty*, CH. 1].

¹¹⁸ *Ibid*.

¹¹⁹ By “shell”, Harris means that the extent of the natural right cannot be determined until “the problematic balance between the requirement of a range of specially protected autonomous choice and necessary intervention by the community to prevent abuse” has been exercised: Harris, *supra* note 1 at 227-228.

¹²⁰ *Ibid* at 224.

¹²¹ Harris, *supra* note 1 at 225; *Millar v Taylor* (1769), 4 Burr. 2303, at 2379; Samuel D. Warren & Louis D. Brandeis, “The Right to Privacy” (1890) 4 Harv. L.R. 193 at 199-200, where the authors argue that the nature of the claim in that case is the enforcement of the right of privacy or “the right to be let alone” (not a property right) with exclusive reproduction rights (a property right). See also Handa, *supra* note 89 at 125-126.

¹²² For instance, privacy is invoked as one of the justifications for the private copying regime that exists in many European jurisdictions, which allows consumers to make a limited number of copies of defined copyright works without infringing copyright, and which provides a levy system to compensate authors: see Natali Helberger & P. Bernt Hugenholtz, “No place like home for making a copy, private copying in European copyright law and consumer law” (2007) 22 Berkeley Tech. L.J. 1061 at 1068-1072.

¹²³ *Ibid*; Christophe Geiger, “The answer to the machine should not be the machine: safeguarding the private copy exception in the digital environment” (2009) 30 EIPR 121 at 122, although the author questions that privacy is still a justification of the private copy exception in a digital environment where copy controls can be effected remotely and outside the private sphere of individuals.

consideration separate from the constitutive and justificatory nature of the scope of exclusive rights and powers that consumers have in commercial copies of copyright works that they own. Although privacy is relevant to consumers to preserve their right to non-intrusion in a general context, it is not necessarily so to support the scope of their ownership rights in commercial copies of copyright works.¹²⁴ If this were to be the case, consumers ought to be granted privileges and powers in relation to commercial copies of copyright works through ownership because not to do so would violate the intimate relationship that they have with copyright works.¹²⁵

Given that commercial copies of copyright works are not creations of the consumers, and are often by nature, although not necessarily, works that are communicated and shared with others, it seems that privacy, as a specific subset of freedoms and autonomous choice, is not the relevant justification for the existence of ownership in commercial copies of copyright works. Privacy could be a justification for ownership in the “mini” or more substantive derivative works or compilations of works that consumers may create from commercial copies of copyright works, certainly with respect to the right to authorize their disclosure through the exclusive right to authorize first publication.¹²⁶

Beside the cases involving the creation of new copyright works derived from the use of commercial copies of copyright works, a better characterization of the relationship between privacy and ownership in commercial copies of copyright works could be that the right of privacy can act in certain circumstances as an “independent property-prohibition rule” that would set limits on the exclusionary powers (and related enforcement rights) of copyright holders on consumers.¹²⁷ One illustration of the application of privacy rights to limit the exclusionary powers conferred by copyright is *BMG Canada Inc. v. John Doe*.¹²⁸ In that case, the plaintiffs, various music providers in Canada, sought an order to compel various Internet service providers to disclose the names of the customers who used specific IP addresses at times that were material to the proceedings.¹²⁹ The Federal Court dismissed the order on the basis that the plaintiffs did not meet the “equitable bill of discovery requirements.” On appeal, the

¹²⁴ However see in a US context, Cohen, “Does Copyright Trump Privacy?” *supra* note 11 at 377-378, where the author links the first sale doctrine, which gives copy owners the right to resell copies of copyright works without copyright holders’ consent, and is therefore one of their freedoms as owners, to user privacy.

¹²⁵ See Harris, *supra* note 1 at 224 on the relationship between privacy and moral justifications for private property.

¹²⁶ Harris, *supra* note 1 at 224-225; *Millar v Taylor* (1769), 4 Burr. 2303 at 2379; Warren & Brandeis, *supra* note 121 at 199-200; Handa, *supra* note 89 at 125-126.

¹²⁷ See the discussion of independent property prohibition rules in Chapter 4 Part V.

¹²⁸ *BMG Canada Inc. v John Doe*, 2004 FC 488; on appeal: *BMG Canada Inc. v John Doe*, *supra* note 94.

¹²⁹ *BMG Canada Inc. v John Doe* (FC), *supra* note 128 at para 9.

resolution of the issue revolved around the proper test to balance the personal property rights of the plaintiffs as copyright holders and the privacy of Internet service providers' consumers, which the Federal Court of Appeal described as follows:

Thus, in my view, in cases where plaintiffs show that they have a *bona fide* claim that unknown persons are infringing their copyright, they have a right to have the identity revealed for the purpose of bringing action. However, caution must be exercised by the courts in ordering such disclosure, to make sure that privacy rights are invaded in the most minimal way.¹³⁰

The Federal Court of Appeal dismissed the appeal, but without prejudice to the plaintiffs' right to commence a further application for disclosure of the identity of the "users," taking into account the reasons given by the Federal Court of Appeal.¹³¹ The plaintiffs later decided not to pursue their claims.

To sum up, the *prima facie* normative status of ownership freedoms and, incidentally and in specific cases of consumer creations, the right to privacy, are justifications that support and help substantiate consumers' claims to *prima facie* open-ended privileges and powers to commercial copies of copyright works. The *prima facie* open-ended privileges and powers evolve in conformity with the environment in which the commercial copies are being supplied. The technological environment that surrounds the manner by which commercial copies can be experienced changes consumers' expectations of their open-ended powers and privileges to commercial copies of copyright works and needs to be taken into account.¹³² The *prima facie* normative status of ownership freedoms can also provide a normative framework to respond to copyright holders' eradication of copy ownership through their commercial practice of restraining consumers' rights to assign and transfer the commercial copies they lawfully acquire. The *prima facie* normative status of ownership freedoms in commercial copies of copyright works is distinct from the instrumental justifications for copy ownership and copyright, which I explore next.

¹³⁰ *BMG Canada Inc. v John Doe* (FCA) *supra* note 94 at para 42.

¹³¹ *Ibid* at para 55.

¹³² See the discussion on the environment in which commercial copies of copyright works are made available in Chapter 1 Part I.

B. Instrumental justifications of (intellectual) property

Instrumental justifications of property and copyright can complement and support the justification of copy ownership that is based on the *prima facie* normative status of ownership freedoms, as previously discussed in this chapter.¹³³ Two instrumental justifications are particularly relevant to the discussion about copy ownership of copyright works. The first justification is the incentive to create and to disseminate works, i.e., the extent to which this prevailing justification for the existence of copyright also justifies copy ownership in copyright works. Concepts of freedom and autonomy are also being explored within the context of this creator-incentive justification, but from an instrumental perspective, i.e., certain behaviours that ought to be promoted within the framework of copyright laws. The second justification is an economic efficiency argument that is generally invoked to support ownership in chattels, and that I apply here more specifically to commercial copies of copyright works.

Copyright in Canada, as a creation of statute,¹³⁴ is justified mainly by instrumental justifications as stated by the Supreme Court in *Théberge v. Galerie d'Art du Petit Champlain inc* [*Théberge*]: “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).”¹³⁵ As I will

¹³³ See the discussion in Part III A of this chapter.

¹³⁴ *Compo Co. v Blue Crest Music Inc.* [1980] 1 S.C.R. 357 at para 23. See the discussion on the nature of copyright in Chapter 5, in particular in Part II.

¹³⁵ *Théberge*, *supra* note 94 at para 30. The Supreme Court has frequently referred to the objectives of copyright law as stated in *Théberge* in subsequent judgments: see the discussion on the balance in copyright law in Chapter 2 Part II. Arguably, the reference by the Supreme Court in *Théberge* to a need to reward authors leans towards natural property rights in the fruits of one's labour justificatory arguments: see the discussion in Part III C of this chapter. In *BMG Canada v John Doe*, *supra* note 94 at para 40, the Federal Court of Appeal described the *raison d'être* of Canadian copyright law in instrumental terms: “Copyright law provides incentives for innovators - artists, musicians, inventors, writers, performers and marketers - to create. It is designed to ensure that ideas are expressed and developed instead of remaining dormant. Individuals need to be encouraged to develop their own talents and personal expression of artistic ideas, including music. If they are robbed of the fruits of their efforts, their incentive to express their ideas in tangible form is diminished.” This view is also prevalent in Canadian copyright policy reports: Economic Council of Canada, Report on Intellectual and Industrial Property, Information Canada, by B.V. Hindley (Ottawa: Economic Council of Canada, 1971) at 37 states that “the institution of the copyright system implies [...] that the additional titles produced as a result of copyright are worth more to the community than the loss resulting from any reduction in the number of copies of titles that would have been distributed in the absence of copyright.”; Canada, Departments of Consumer and Corporate Affairs and Communications, *From Gutenberg to Telidon: A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act* (Ottawa: Supply and Services Canada, 1984) at 1, where copyright justification is said to be to: “reinforce the general principle of protecting the results of creative effort

discuss below in this chapter, the reference by the Supreme Court in *Théberge* to a need to reward authors also leans toward natural property rights in the fruits of one's labour justificatory arguments.¹³⁶ In the US, instrumentalist theories are often invoked to justify copyright: under the US Constitution, Congress's power with respect to copyright (and patents) is "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."¹³⁷ Under Harris's theory of property, the creator-incentives instrument is the sole plausible justification for creating private property through copyright.¹³⁸

The biggest flaws in the instrumental justification of copyright to incent creators and the dissemination of works reside in its inconsistency, lack of persuasiveness,¹³⁹ and difficulty of application.¹⁴⁰ What scope of property rights needs to be conferred on copyright holders for them to be incented to create? Is property the *sine qua non* condition of encouraging creativity or are there not other ways to incent it?¹⁴¹ Is there not sufficient evidence of creative processes taking place independently of an immediate motive of financial gain¹⁴² or in areas where no intellectual property rights are being conferred?¹⁴³ What type of creativity and innovation should be promoted to maximize

in the social and technological context in which it must be applied." Instrumentalism, (in particular, utilitarianism) is the most frequently invoked theoretical justification for western copyright law: Handa, *supra* note 89 at 75. For a review of Supreme Court of Canada copyright cases confirming an instrumentalist approach to copyright law, see Daniel Gervais, "The Purpose of Copyright Law in Canada" (2005) 2 U. Ottawa L. & Tech. J. 315.

¹³⁶ See the discussion in Part III C of this chapter.

¹³⁷ US Const art I, s 8.

¹³⁸ Harris, *supra* note 1 at 296ff.

¹³⁹ For example see Ruth Towse, "Creativity, Copyright and the Creative Industries Paradigm" (2010) 63 KYKLOS 461, where the author evaluates studies on economics of creativity to see the correlation between copyright as an economic incentive for individuals to create and actual individual creativity, concluding that a lot of work remains to be done to assess the effectiveness of economic incentives to individual creativity. See David Vaver, "Intellectual Property Today: Of Myths and Paradoxes" (1990) 69 Can. Bar Rev. 98 at 102-113 where the author reviews utilitarian justifications of copyright through three myths: the myth that copyright law is designed to protect authors, the myth that copyright law encourages art and literature, and the myth that copyright law encourages dissemination of works.

¹⁴⁰ For a review and critique of instrumental and utilitarian theories as they relate to intellectual property, see Hettinger, *supra* note 89 at 107-110; Fisher, *supra* note 89 at 169, 173-174 and 177-184.

¹⁴¹ See Hettinger, *supra* note 89 at 109.

¹⁴² I refer here more particularly to the various forms of works that fall within the scope of copyright law that are freely shared and communicated through the internet by individual authors. See also: Julie E. Cohen, "Copyright as Property in the Post-Industrial Economy: A Research Agenda" (2011) 2011 Wis. L. Rev. 141 [Cohen, "Copyright as Property"] at 143.

¹⁴³ As one example, the high end cuisine industry is one area where a significant volume of innovation and creativity takes place in spite of very little intellectual property rights protection. On the theme of innovation in areas where there is little intellectual property protection see generally Kal Raustiala & Jonathan Springman, *The Knockoff Economy: How Imitation Sparks Innovation* (New York: OUP, 2012): where the authors explore

net social welfare and is copyright law preoccupied at all by this question?¹⁴⁴ Who are we incenting: authors or firms to invest in the production and distribution of copyright works?¹⁴⁵

One of the greatest disappointment of all in the application of the instrumental balancing act of copyright between the incentive to create and disseminate works and a fair reward to the creator, is the failure to create the right level of incentive by paying as much regard to the effect of such private property on the recipients or “intended beneficiaries” of copyright works as it does to the scope of the rights of copyright holders. In their book devoted to users of copyright works, Ray Patterson and Stanley Lindberg attributed this imbalance in consideration that is to the detriment of copyright users to the focus of copyright’s function on creation rather than on distribution and on the abstractedness of users’ interests in the process:

By treating copyright’s function as encouraging the creation (rather than the distribution) of works, courts have increased the difficulty of equating the user’s interest in having access to the work for learning with the copyright owner’s interest in protecting the right to profit. The difficulty is compounded because the claim of profit is a concrete right with an equitable basis (creation and

highly creative industries where copying is generally legal such as fashion, food, finance and professional sports.

¹⁴⁴ Copyright protects “original” works in the sense of artistic, dramatic, literary or musical works “originating” from its creator and is not concerned with the artistic quality or novelty or contribution of the work to society. The threshold for a work to receive copyright protection is fairly low as it was recently confirmed by the Supreme Court of Canada in *CCH Canadian Ltd. v Law Society of Upper Canada* 2004 SCC 13 [*CCH*] at paras 14-16.

¹⁴⁵ See Fiona Macmillan, “Copyright and Corporate Power” in Ruth Towse (ed), *Copyright and the Cultural Industries* (Cheltenham, UK: Edward Elgar, 2002) 99-118, where the author argues how copyright law is structured to promote power –hegemony of a few leading firms in the cultural industry; Cohen, “Copyright as Property”, *supra* note 142, invites us to reframe the justifications of copyright from an author- incentive-based theory to a capital- investment incentive in creative industries’ focus, as the more accurate account of the objectives of copyright. The recognition of the role of and support given to firms (in contrast with individual authors) within copyright law is reflected in different ways. For example, the *CCA*, *supra* note 4, s 13 (4)-13(7) provides for the assignability in whole or in part of copyright and other contractual arrangements for its exploitation. For a discussion on copyright as a resource capable of exploitation, see Chapter 5 Part IV A (i). See also, *CCA*, *supra* note 4, s 13(3) which provides that where “the author of a work was in the employment of some other person under a contract [...] and the work was made in the course of his employment by that person” the employer of the author shall be unless provided otherwise by contract, the first owner of the copyright. In Europe, EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, [2001] OJ, L167/10 [*Directive 2001/29/EC*] Preamble, 10th recital, emphasizes the need to encourage investment in cultural industries to justify strong intellectual property rights: “If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as on-demand services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.”

distribution of the work), whereas learning is only an abstract right with no equitable basis. Yet the fallacy that copyright is intended to encourage the creation of works has been a prime cause of the copyright-is-the-ownership-of-the-work fallacy. And given this latter fallacy, it takes judges with vision to balance the right of learning with the right to profit, as did the framers of the copyright clause.¹⁴⁶

Carys Craig makes a similar argument to that of Patterson and Lindberg by pointing to the need to centre the instrumentalist justifications of copyright on the work-public rather than on the current author-work relationship upon which the framework of copyright is based.¹⁴⁷ In Chapter 5, I demonstrated how property theory can constrain copyright holders' exclusive powers deriving from the author-work relationship by the impossibility of copyright holders to *own their work*.¹⁴⁸ I also discussed how, in Canada and other jurisdictions worldwide, the exclusive rights of copyright holders have progressively expanded in subject matter, scope, and duration.¹⁴⁹ While in recent years the Supreme Court has accentuated the importance of the rights of users within the objectives of the *CCA*, copyright law continues to offer a limited and fragmented articulation of the rights of the intended beneficiaries of copyright works.¹⁵⁰ The more realistic account of the nature and narrower scope of copyright holders' exclusive rights to counter the over-propertization tendencies of copyright that I presented in Chapter 5 has direct implications on how we apply the creator-incentive instrumentalist justification of copyright.¹⁵¹

Setting aside the difficulties in the application of instrumental justifications to copyright, the assumption is that the progress of science and the promotion of creation are to serve primarily as

¹⁴⁶ L. Ray Patterson, & Stanley W. Lindberg, *The Nature of Copyright a Law of Users rights* (Athens: University of Georgia Press, 1991), at 208-209.

¹⁴⁷ Craig, *supra* note 89 at 5-6: the "public interest approach justifies copyright in light of its public purpose of encouraging intellectual creativity. Rights are granted to authors in the belief that intellectual works will be underproduced unless there is sufficient opportunity to exploit them for financial return. Only if we appreciate the relationship between society and intellectual works can we recognize this underproduction as a danger that public policy should seek to avert.", adding "if we understand copyright as based upon some conception of the author-work link, we fail to see the relationship between the public and the work as anything other than the consequence of the author-work relationship. Conversely, an effective and justifiable copyright system requires that the copyright interest (the link between author and work) be structured with deference to the public-work link."

¹⁴⁸ See the discussion in Chapter 5 on the limited scope of copyright holders' exclusive rights as not extending to *ownership of the work*, in particular, Part III A (i)

¹⁴⁹ See the discussion in Chapter 5 Part II.

¹⁵⁰ *CCH*, *supra* note 144; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 [*Bell Canada*]; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 [*Alberta*]. See the discussion on the place of users in copyright law in Chapter 2, in particular Part II.

¹⁵¹ See the discussion in Chapter 5, in particular in Part III and Part IV.

justifications for the property rights of copyright holders. The creativity-incentive policy objective behind stronger copyright protection often posits consumers as necessarily benefiting from this creativity as passive recipients, but not as participants.¹⁵² This assumption alone may explain in part the expansion of copyright to a point where it can become counterproductive to its initially stated goals of inciting creations and the dissemination of works.¹⁵³ With the amendments made in 2012,¹⁵⁴ the *CCA* makes more room for consumers and other users as creators within the framework of copyright.¹⁵⁵ However, in Chapter 2, I argued that the recognition of “consumers as creators” is important, but that it should not overshadow the place that the copyright framework needs to make for seemingly more passive consumers and their part in innovative processes.¹⁵⁶

Modern societies generally value and encourage innovation and creativity as main engines for growth and prosperity.¹⁵⁷ Copyright consumers benefit from recent innovation and creativity within and outside the subject matter of “original literary, dramatic, musical and artistic work” that copyright protects.¹⁵⁸ The digital revolution, the explosion of communication networks, technological information access, and reproduction tools have led to unprecedented dissemination and sharing of works protected by copyright.¹⁵⁹ Recent technological developments allow consumers to experience copyright works in ways that were, not so long ago, unthinkable, and in volumes that are

¹⁵² Regarding the framework of international copyright law see for example, see *WIPO Copyright Treaty*, 20 December 1996, WO033EN, online: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P8_189 [*WCT*] Preamble; and the *WIPO Performances and Phonograms Treaty*, 20 December 1996, WO034EN, online: http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html [*WPPT*], Preamble. For a discussion on Canada’s international copyright law obligations, see Chapter 3 Part V. In a European context, see *Directive 21/29/EC*, *supra* note 145, Preamble, Recital 9-10.

¹⁵³ Michael Heller refers to over protection of intellectual property leading to the “tragedy of the anti-commons”: see Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Live*, (New York: Basic Book, 2008); Peter S. Menell, “The Property Rights Movement’s Embrace of Intellectual Property: True Love Or Doomed Relationship?” (2007) 34 *Ecology L.Q.* 713 at 744, whereby the author makes the argument that treating intellectual property too much like tangible real property, can lead to an underutilisation of intellectual property, while exclusionary powers associated with tangible real property are meant to avoid an over utilization of the resources (i.e. the “tragedy of the commons”).

¹⁵⁴ The amendments were introduced with the entry into force of the *CCMA*, *supra* note 9.

¹⁵⁵ *CCA*, *supra* note 4, s. 29.21, i.e., the “non-commercial user-generated content” exception to copyright infringement; s 29 now allows the fair dealing of existing copyright works for the purposes of parody or satire.

¹⁵⁶ See the discussion on the place of users in copyright law in Chapter 2, in particular in Part V.

¹⁵⁷ As this is reflected among others in a utilitarian approach to copyright. For Handa, *supra* note 89 at 118, the reason why utilitarian theories have been more prevalent than creator natural rights based theories in Anglo-American traditions of copyright is consistent with emphasis on knowledge and progress in these copyright traditions.

¹⁵⁸ *CCA*, *supra* note 4 s 5.

¹⁵⁹ See the discussion in Chapter 1 Part I.

unprecedented.¹⁶⁰ As I discussed in Chapter 3, International intellectual property treaties that were adopted in recent years, and which set the framework for copyright reform at the domestic level, responded to one perspective of the technological revolution by strengthening copyright holders' rights, as part of the *digital agenda*.¹⁶¹ The agenda was led chiefly by the fear of the ravages of piracy on the copyright house and by the fear that copyright holders would be reluctant to make their works available through the Internet.¹⁶² Through the *digital agenda*, there was no regard for the other perspective on the technological revolution and how this could empower consumers and other users in ways that could support and promote the declared creator-incentive objectives of copyright. Many years into the digital revolution, we are still waiting for a legal and normative even-handed treatment that includes looking at the beneficial impacts and legitimate expectations that it has created for copyright consumers.

There is a need to make room for consumers through the recognition of their integral role in the “incent to innovate” instrumental equation invoked as the main justification of copyright, alongside the place that is given predominantly to copyright holders.¹⁶³ Why stimulate creations if it is not for the benefit of those who will access them?¹⁶⁴ As Niva Elkin-Koren argues, in a US context:

to promote creativity it is insufficient to provide incentives to authors by empowering them to exclude second-comers. It is also inappropriate to exempt only transformative uses of copyright works. Promoting creativity requires expanding access to creative works. Copyright law must therefore

¹⁶⁰ *Ibid.*

¹⁶¹ See the introductory comments in Chapter 3 Part III B on the digital agenda initiative as led by the World Intellectual Property Organization giving rise to the signature in 1996 of *WCT*, *supra* note 152 and the *WPPT*, *supra* note 152. See also the discussion on Canada's international obligations in Chapter 3 Part V.

¹⁶² *Ibid.*

¹⁶³ Niva Elkin-Koren, “Making Room for Consumers Under the DMCA” (2007) 22 Berkley Technology Law Journal 1119 at 1141 argues: “What we call “consumption” of informational works is never a passive behavior-- it is a conversation, or a social activity of interaction. When a reader engages with an artistic expression, she contributes to its meaning. Thus, consumption of informational works, even for one's sole benefit, promotes copyright goals....This reality of exchange and interaction suggests that in order to promote creativity it is insufficient to simply provide incentives to authors to produce. It is also necessary to expand access to creative works. Access, in this sense, becomes a central means for promoting production, creation, and progress.”; see also Liu, “Owning Digital Copies,” *supra* note 3 at 1309ff. For a discussion on the alignment between copy ownership and the copyright incentives see Aaron Perzanowski & Jason Schultz “Copyright Exhaustion and the Personal Use Dilemma” (2012) 96 Minn. L. Rev. 2067 at 2110-2112.

¹⁶⁴ Jessica Litman, “Lawful Personal Use” (2007) 85 Tex. L. Rev. 1871 [Litman, “Lawful Personal Use”] at 1879, refers to “copyright liberties”: i.e. the fact that “copyright law was designed to maximize the opportunities for non exploitative enjoyment of copyright works in order to encourage reading, listening, watching, and their cousins”. The author argues that they are “both deeply embedded in copyright's design and crucial to its promotion of the “Progress of Science.””

expand the balance it strikes between authors and users to cover not only subsequent authors but also simply consumers of cultural goods who might become authors in the future.¹⁶⁵

For Elkin-Koren, consumers are no less means of production than authors.¹⁶⁶ Thus, from that perspective, the justification of copyright based on the incentive to create and to disseminate works also needs to weigh in the optimal access to consumers and users that can further support that goal at a broader level and on a longer-term basis.¹⁶⁷ In that light, the information age offers an unprecedented opportunity to reconsider the role of competing property rights in commercial copies of copyright works as part of the overall property design of copyright. Balancing the incentive to create and to disseminate works while fairly rewarding the creator also means balancing those interests in the immediate term – i.e., through the property rights conferred to the creator – and on a longer-term basis – i.e., through incenting consumers to be culturally engaged and innovative. Without this balancing act, there is a risk of taking copyright out of its instrumental justification orbit.¹⁶⁸

One mean to incent consumers to be culturally engaged and promote innovation with respect to commercial copies of copyright works that they access is to protect a certain level of freedom and autonomy in how they experience the works.¹⁶⁹ Ownership is one important vehicle for the exercise of freedom and autonomy, which includes, for instance, the ability to choose how and when and with whom a consumer will enjoy the copyright work. In that sense it allows communication and self-

¹⁶⁵ Elkin-Koren, *supra* note 163 at 1141.

¹⁶⁶ *Ibid.* see also Litman, “Lawful Personal Use”, *supra* note 164 at 1880.

¹⁶⁷ See Geiger, *supra* note 123 at 123 who argues in favour of maintaining the private copy exception to copyright infringement as a means to ensuring future creations by future authors: “If the idea that copyright is intended to be the instrument for cultural and social progress is taken seriously, it is appropriate to favour the uses of works already created that serve the creation of future works (“creative” uses), to an extent going beyond the cases provided for teaching and research. The freedom of expression and information of the creator could impose such a solution.”

¹⁶⁸ See Jessica Litman, “Creative Reading” (2007) 70 *Law & Contemporary Problems* 175 [Litman, “Creative Reading”] at 187, on how to support a “cultural environmentalism”: “We need to do this by developing much more robust language, theories, and stories about the rights of readers, listeners, and viewers. We need to gather a more compelling collection of justifications for the borders between controlled and uncontrolled uses of copyright works.”

¹⁶⁹ Liu, *supra* note 65 at 406-420; Elkin-Koren, *supra* note 163 at 1143, refers to a “breathing space” which may include “the freedom to choose the work one wishes to consume or any part of it (and, likewise, the freedom to ignore or refuse other parts); the freedom to choose where to experience the work and how; the freedom to experience the work in privacy without the fear of surveillance; and the freedom to make one’s own reading of the work, to experiment with it, and to share that reading.”

expression in respect of the copyright work.¹⁷⁰ Here, freedom and autonomy are promoted to perfect the overarching goals of copyright as instruments. Elkin-Koren argues that the consumption of copyright works may require even greater protection than other consumptive goods to preserve essential autonomy and freedoms:

Cultural artifacts are not simply useful commodities. While they often have an entertainment value that could be quantified, they also possess a communicative value and a symbolic significance. They engage our minds in a more direct and intimate way than do mundane commodities and, therefore, expose consumers to a higher risk of deeper and more intrusive restrictions of freedom. This particular vulnerability of information consumers is often overlooked.¹⁷¹

If we maintain the current passive approach to the definition of the property rights in commercial copies of copyright works and leave it to copyright as currently framed and interpreted, and to the will of copyright holders through their exclusive rights to authorize, we are effectively weakening expectations with respect to the participation that consumers ought to play in a modern, cultural, and innovative society and, in turn, shaping their own perception of the same.¹⁷² From that perspective, a creator-work dissemination-incentive instrumental justification of copyright, that takes into account consumers and other users' interests, also leads to the need to preserve a certain level of freedom and autonomy of copy owners.

In parallel to the incentive to create and to disseminate copyright works as a justification for the ownership in commercial copies of copyright works, there is also a widespread economic efficiency argument that generally supports maintaining a property institution with respect to chattels and other real property. The argument is that by doing so the state delegates "use-channelling and use-policing functions" to individual owners and takes the burden off the community for such functions.¹⁷³ Conversely, a society that does not support property institutions would offer access to resources in a communal, controlled, monitored, and policed use environment.¹⁷⁴ In their work affirming the existence of users' rights to copyright, Patterson and Lindberg invoked a similar market efficiency argument:

¹⁷⁰ Liu, *supra* note 65 at 406-411; Elkin-Koren, *supra* note 163 at 1143; Litman, "Lawful Personal Uses" at 1879.

¹⁷¹ Elkin-Koren, *supra* note 163 at 1136-1137.

¹⁷² *Ibid* at 1143.

¹⁷³ Harris, *supra* note 1 at 242.

¹⁷⁴ *Ibid*.

The law of users' rights, in other words serves a socially desirable purpose in that it promotes market discipline by allowing market forces to determine prices. To deny the right of individual use would be to employ copyright to control the conduct of countless citizens for the alleged financial benefit of a few. But contrary to the claims of the industry, copyright was never intended to create and guarantee profit, only to protect the work in the market place. Users also have rights.¹⁷⁵

Efficiency is not an objective of copyright design or justification for the existence or limitation of copy ownership that exists in isolation of other substantive values or instrumental goals.¹⁷⁶ Nevertheless, efficiency is often an important indicator that can lend support to substantive values or point to important difficulties in their promotion and implementation. In the context of copyright and copy ownership, an efficiency analysis of the interests at stake can signal the proper scope of property rights that should be maintained to incent creations on the one hand, and to value and allow *prima facie* open-ended freedom powers and privileges of copy ownership on the other.¹⁷⁷ With respect to copyright works embedded in tangible objects, e.g., books, CDs, DVDs, consumers are generally aware of their privileges and powers as owners of the copies of the copyright works and look after their own interests to put their ownership rights to the most efficient and productive use (e.g., unlimited reading, listening, viewing, sharing, lending, donating, second-hand sale, etc.).

The economic efficiency argument supports the *prima facie* normative status of ownership freedoms as a justification to define the scope of ownership in commercial copies of copyright works previously discussed in this chapter.¹⁷⁸ It is the widespread and well-established concept of ownership that creates the efficiency: as owners, consumers generally know what they can do with their commercial copies of copyright works embedded in physical objects without the need to resort to elaborate lists of terms and conditions of use.¹⁷⁹ In the case of digital copies either distributed online or with a physical

¹⁷⁵ Patterson & Lindberg, *supra* note 146 at 193.

¹⁷⁶ A contrary view may be provided by law and economics theories which tend to focus on how copyright law can promote economic efficiency as an end goal. See for example: William M. Landes & Richard A. Posner, "An Economic Analysis of Copyright law" (1989) 18 *Journal of Legal Studies*.

¹⁷⁷ In several European jurisdictions, the economic argument, or the realization of a market failure is invoked to justify the private copying regime, together with other justifications such as privacy, freedom of expression of consumers, justice to authors through the automatic levy remuneration system. Under the private copying regime, consumers are allowed to make a limited number of copies of defined copyright works without infringing copyright. The private copying regime provides for a levy system to compensate authors: see Helberger & Hugenholtz, *supra* note 122 at 1068-1072.

¹⁷⁸ See the discussion in Part III A of this chapter.

¹⁷⁹ Seringhaus, *supra* note 3 at 171, argues that copy ownership of copyright works need to be maintained on that basis. See the discussion on the standardization of property in Chapter 4 Part III and Part II C of this chapter. I discussed however that the standardization of property or *numerus clausus* principle was less present in the case of personal property embedding copies of copyright works than with respect to other commodities.

medium, and in both cases with a non-negotiated standard end-user agreement, at least two factors affect the applicability of the economic efficiency argument. First, the potential freedoms of use by consumers are growing exponentially by new network, access, copying, and sharing capabilities,¹⁸⁰ with the result that consumers have a new understanding about ownership in commercial copies of copyright works. Consumers' understanding does not necessarily corroborate what copyright law (and the contractual terms dictated by copyright holders) allow them to do, which means significant information costs for consumers.¹⁸¹ Second, the traditional economic efficiency justification for maintaining ownership in chattels can be invoked to counter the growing commercial practice of copyright holders to eradicate copy ownership altogether by restricting consumers' ability to transfer and assign the commercial copies they lawfully acquired.¹⁸² By maintaining traditional ownership in the copies of copyright works, copyright holders lower their production and marketing costs (i.e., drafting, implementing, and maintaining convoluted terms and conditions), as well as their enforcement costs. In fact, by eradicating copy ownership, copyright holders are creating an environment whereby every act is subject to potential scrutiny and varies according to the terms and conditions that copyright holders dictate, as opposed to the common understanding of ownership.

Over time, it is possible, although speculative, that efficiency would be increased – and even brought to a similar level as traditional common understandings of copy ownership – by consumers becoming accustomed to new access rights to commercial copies of copyright works and to the fact that they no longer own the commercial copies. This would require *inter alia* that all copyright holders' terms and conditions would become substantially similar. In the meantime, and generally, the implementing and enforcement costs of an environment of non-negotiated standard end-user agreements with possible variable terms each time tend to be underestimated.¹⁸³

¹⁸⁰ This includes all capabilities made available through the digitization of works and the accessibility that the Internet provides: MP3 devices, Facebook, YouTube, are examples of widespread reproduction tools and network sharing capabilities. See also the discussion in Chapter 1 Part I.

¹⁸¹ Seringhaus, *supra* note 3; Eduardo M. Penalver & Sonia K. Katyal, *Property Outlaws* (New Haven and London: Yale University Press, 2010) at 40 refer generally to intellectual property's "unpredictability", engendering huge information costs for consumers, and pointing generally to inefficiency and counter productivity of intellectual property's private property regime. See the discussion on the standardization of property in Chapter 4 Part III and Part II C of this chapter. I discussed however that the standardization of property or *numerus clausus* principle was less present in the case of personal property embedding copies of copyright works than with respect to other commodities

¹⁸² See also the discussion on the standardization of property applied to commercial copies of copyright works in Part II C of this chapter.

The cost of use-channelling and use-policing functions is not to be borne by private copyright holders alone; it also becomes the burden of society, through other private intermediaries,¹⁸⁴ the court system, and police authorities' involvement to enforce copyright holders' trespassory powers. The efficiency argument to support the subsistence of copy ownership only has value to the extent that we can address the first issue adequately, namely the modified understanding that consumers have about owning digital commercial copies of copyright works. Until we are willing to consider the implications of the shift that has taken place in the basic understanding of copy ownership in a digital environment,¹⁸⁵ and make the proper adjustments, the confusion that prevails over the meaning of ownership of commercial copies of copyright works will remain an important obstacle to transaction efficiency.

To sum up, the instrumental creator-incentive justification to support the creation of property interests through the copyright regime also supports the interests of copyright consumers as full participants in the creative process. As one of the most influential justifications of copyright, the instrumental creator-incentive rationale also justifies a scope of ownership of *prima facie* open-ended powers and privileges in commercial copies of copyright works that recognizes that the incentive to create should also apply to consumers. I will now turn to another influential theoretical justification of copyright and, more particularly, to the impact it can have on defining the scope of ownership of consumers' rights to commercial copies of copyright works.

C. Natural property rights in the fruits of one's labour

Property theories justifying natural rights in the fruits of one's labour offer little direct support to determine the proper scope of ownership in commercial copies of copyright works.¹⁸⁶ Natural right property theories on the fruits of one's labour are invoked to justify the existence of copyright by

¹⁸³ Liu, "Owning Digital Copies," *supra* note 3 at 1321.

¹⁸⁴ Such as the resources that need to be deployed by internet service providers to comply with their legal obligations in case of copyright infringements.

¹⁸⁵ On the idea of paying attention to certain manifestations of "property outlaws", the main thesis of Penalver & Katyal, *supra* note 178, is to look at the effect that property disobedience has had in recent history on the evolution of the concept of property. The authors argue that movements or property disobedience are an essential component to property's dynamism, evolution and longevity.

¹⁸⁶ Liu, "Owning Digital Copies," *supra* note 3 at 1326, arrives at the same conclusion by looking at various justificatory theories that can support the ownership in copies of copyright works.

focusing on the entitlements to creations.¹⁸⁷ The consumption of copyright works by consumers does not necessarily or effectively entail the immediate creation of anything ideational or corporeal.¹⁸⁸ Nevertheless, I will address some of the implications of natural rights property theories on the fruits of one's labour because of their profound influence on copyright law and theory¹⁸⁹ and, in turn, on consumers' rights to commercial copies of copyright works.

The question of whether a person can claim a natural right to property is whether she has a moral claim to a resource, independent of social convention or positive legal provisions, so that others must confer or be subject to ownership use-privileges and control powers over that resource.¹⁹⁰ The natural property rights in the fruits of one's labour as a justification of copyright has been the object of strong criticism. Among other things, the applicability of the fruits of ones' labour theory to intangible property has been questioned,¹⁹¹ as well as the difficulty in applying proportionality between the labour contribution and the exclusive rights conferred by copyright.¹⁹² Other criticisms include the argument that exclusive property rights do not "naturally" flow as the sole reward or recognition for one's labour¹⁹³ and that the right to use and possess one's labour and the right to profit from it by selling it in the marketplace derive from distinct justifications.¹⁹⁴ At a more fundamental level, the natural property rights in the fruits of one's labour theory are problematic when the theory is interpreted as inferring that copyright holders *own their work*, a tendency that I condemned as I discussed the nature of copyright in Chapter 5.¹⁹⁵

¹⁸⁷ See the discussion below in Part III C of this chapter.

¹⁸⁸ See the discussion on the various aspirations of copyright consumers from the more passive to the consumer-author in Chapter 2 Part V.

¹⁸⁹ Hettinger, *supra* note 89 at 100, refers to the entitlement to the fruits of one's labour as perhaps the "most powerful intuition supporting property rights" including with respect to products of the mind.

¹⁹⁰ Harris, *supra* note 1 at 182.

¹⁹¹ Fisher, *supra* note 89 at 184-189.

¹⁹² Hettinger, *supra* note 89 at 101, 104.

¹⁹³ One of the mistakes is to conflate the issue of deserving a reward with what the reward should be: Hettinger, *supra* note 89 at 103. The type of reward is in fact dictated by social convention and is not as such a natural right: Harris, *supra* note 1 at 207.

¹⁹⁴ For instance, Hettinger, *supra* note 89 at 100-103, argues that while there may be a natural right in possessing and using one's labour, there is no natural right in selling it and making a profit from it in the market place, which is largely a socially created phenomenon.

¹⁹⁵ See the discussion in Chapter 5, in particular Part III and IV. See also Craig, *supra* note 89 and the discussion further below in Part III C of this chapter.

Arguments that copyright derives from a natural right to the fruits of one's labour were "officially" put to rest in Canada¹⁹⁶ and also in the US¹⁹⁷. Yet, regardless of the existence or not of a natural right to the fruits of one's labour from which property rights derive, fundamental aspects of copyright law, such as the low threshold of originality required for a work to be protected by copyright, seem to fit more nicely with the fruits of one's labour theory¹⁹⁸ than with an instrumental justification of copyright.¹⁹⁹ Moreover, case law abounds with natural property rights in the fruits of one's labour derived analyses for rewarding copyright holders for the uses of their work, or for expanding the scope of copyright property rights.²⁰⁰

There is a "natural" appeal to apply the fruits of one's labour natural law theory to copyright, one of the elements of which is a disconcerting facility of conceptualization and of application: everything that emanates from an author that qualifies as a copyright work she owns.²⁰¹ Copyright becomes justified to provide the trespassory powers that concretize that ownership. This is a much simpler proposition than trying to establish the optimal scope of copyright insofar as it incents creations and dissemination of works under the instrumental justification of copyright.²⁰² Craig attributes the tendency to rely on the fruits of one's labour theories to justify copyright on the centrality of the author-work relationship in copyright law, which embeds a reliance on a romantic vision of authorship and a conception of the requirement of originality as implying the notion of "independent

¹⁹⁶ the Supreme Court of Canada declaration in *Compo Co. v Blue Crest Music Inc.*, *supra* note 58 at para 23, considerably weakens the strength of any argument that copyright derives from natural law: "copyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute." (subsequently applied in numerous Supreme Court Judgements: see *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427 at para 82).

¹⁹⁷ US Const, Art I, s 8, stipulates that Congress's power in the area of Copyright (and patents) is to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

¹⁹⁸ In *CCH*, *supra* note 144 at para 15, the Supreme Court of Canada referred to how the various existing legal traditions on the applicable threshold of originality in copyright law derive from natural law concepts based on the fruits of one's labour.

¹⁹⁹ Under which there should arguably be a greater scrutiny and selection in the types of works that society wants to incent to create and disseminate, and hence a higher threshold in the types of works that deserve copyright protection.

²⁰⁰ From a Canadian perspective, see Craig, *supra* note 89. From a US perspective, see Fisher, *supra* note 89 at 174, where the author cites examples from law reform debates, US Supreme Court decisions as well as lower court decisions. In *Théberge*, *supra* note 94, the Supreme Court of Canada also seems to invoke the fruits of one's labour theory as a justification for copyright, as I discuss further below in Part III C of this chapter.

²⁰¹ See the discussion on the nature of copyright and on the debate of associating copyright with property in Chapter 5 in particular Part III A (i) and Part II.

work.”²⁰³ As a result, “[t]he individuality and originality of authorship establishes a simple route towards individual ownership and the propertization of creative achievement.”²⁰⁴ Views diverge greatly on the beneficial or detrimental effects of applying the fruits of one’s labour theory, in particular, Locke’s labour-desert theory of property and its ability to ensure the legitimacy of the copyright system.²⁰⁵ As I discussed in Chapter 5, an erroneous application of property to copyright can lead to the over-propertization of copyright.²⁰⁶ We need to guard against any theoretical justification of copyright or interpretation that leads to unfounded copyright expansionism.

The way in which the fruits of one’s labour theory has been applied to copyright is harmful to the assertion of clearer property rights in commercial copies of copyright works in at least two respects. First, under that theory, the competing claims are unequivocally framed as labourers (i.e., copyright holders) v. idlers and free riders (i.e., consumers).²⁰⁷ The consumers cannot reap where they have not sown is the premise. The copyright holder labourers are deemed to be *a priori* meritorious (even if copyright law does not impose any requirement of artistic quality or novelty for a work to be protected). The fruits in one’s labour theory to justify copyright places copyright holders on a pedestal.²⁰⁸ Any claim of unauthorized use of the copyright holders labourers’ work is, from that standpoint, *a priori* suspicious. Second, as I already argued above in this chapter, the fruits of one’s labour natural law theories can be harmful to copyright consumers if, in spite of its own internal limitations, for instance by Locke’s famous provisos,²⁰⁹ they effectively lead to an “over-propertization” of copyright. The inflation of copyright holders’ exclusive rights then acts as an ever-

²⁰² See the discussion in Part III B of this chapter.

²⁰³ Craig, *supra* note 89 at 7.

²⁰⁴ *Ibid.*

²⁰⁵ A more nuanced application of Locke’s natural law justification of property to intellectual property that fully accounts for Locke’s provisos may not lead to such expansionist tendencies. See: Christopher M. Newman, “Transformation in Property and Copyright” (2011) 56 Villanova Law Review 251 at 297-298. For a review and critique of the arguments that Lockean fruits of one’s labour property theory can effectively ensure a robust public domain, see Craig, *supra* note 89, in particular at 51-57. On the application of Locke’s natural law theory to copyright freelancers and publishers, see Giuseppina D’Agostino, *supra* note 89 at 205-219.

²⁰⁶ See the discussion in Chapter 5, in Particular Part III and Part IV.

²⁰⁷ On the emphasis that is placed by law and policy makers on the concept of “free riding” and its harmful effects, see Lemley, *supra* note 89 in particular at 1044.

²⁰⁸ Craig, *supra* note 89 at 58, develops a similar argument on how the application of labour-desert derived analysis to copyright law begins the reasoning from the copyright holder standpoint, and how this directly impacts on the outcome.

²⁰⁹ Locke’s provisos are commonly referred to as the “no spoilage” and “enough as good” provisos: for a review and critique of the application of Locke’s provisos as a mean to limit the scope of copyright, see Craig, *supra* note 89 in particular at 22ff and at 48ff.

expanding limitation on the ownership in commercial copies of copyright works, to the point that the property interests in copies of copyright works are hollowed out of any meaningful substance.²¹⁰

To sum up on the effects of the fruits of one's labour theories, consistent with my earlier characterization of copyright as a limited property interest, to the extent that the fruits of one's labour theories, including the Lockean labour-desert theory of property, and as a matter of fact any other theory, would *inexorably or predominantly* lead to the over-propertization of copyright, it should, in and of itself, be sufficient to discredit the theories as plausible justifications of copyright.

To sum up, I have discussed three theoretical justifications of property, either for their guidance to define the proper scope of ownership of commercial copies of copyright works or for their influence on the fate of ownership in commercial copies of copyright works. I will conclude this part by discussing how the three theoretical justifications of property that I discussed here are present to some extent in the reasons by the majority in *Théberge*, the leading case of the Supreme Court on the objectives of the *CCA*.²¹¹ The underlying normative value of copy ownership, the need to incent creation and dissemination of works²¹² efficiency, and arguably fruits of one's labour justifications of copyright (i.e., the need give a just reward to the author), are each present to some extent in the reasons of the majority in the *Théberge* judgment.²¹³

In *Théberge*, Binnie J. for the majority drew the line between the rights of the owner in the physical copy of a copyright work and the rights of the copyright holder. Having decided that the transposition of lawfully purchased posters of artist Claude Théberge's paintings on a canvas was not a "reproduction" of the copyright work as per the exclusive rights conferred to Théberge under section 3 of the *CCA*, the Court's majority decided that such transposition did not fall within the economic rights of the artist (while it may have fallen under his moral rights). One of the reasons given by the majority was:

²¹⁰ See the discussion on the dangers of the misapplication of property concepts to copyright in Chapter 5 Part II and Part III.

²¹¹ *Théberge*, *supra* note 94. See also the discussion on the balance objectives of copyright law as they are enunciated in *Théberge* in Chapter 2 Part II.

²¹² With long term interests in mind so that there are no undue hindrances to incorporation and embellishment of future creative works, or that it does not create "practical obstacles to proper utilization": *Théberge*, *supra* note 94 at para 32.

²¹³ *Ibid.*

The proper balance among these [i.e., the creator's rights] and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it. Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.²¹⁴

The peculiarity of the facts in this case invites some caution on the extent to which it asserts greater property rights in commercial copies of copyright works. The fact that this is a four-to-three decision also illustrates the ambiguity that prevails around the breadth that we are willing to give to copyright holders' rights, even beyond the exclusive rights expressly conferred to them by the *CCA*. And yet, the above-cited reasons in *Théberge* articulate the balancing act between various competing interests that needs to take place within copyright law, with a particular emphasis on owners of commercial copies of copyright works. While the reasons for the majority refer to the need to incent the creation of works and to offer a just reward to creators, they strongly echo the freedoms that are intrinsic to the property rights in the copy of Claude Théberge's painting, the need to set limits to copyright holders' ownership rights to encourage future creations, as well as the instrumental efficiency that results from such freedoms and proper limitations. *Théberge* illustrates a pluralistic approach to the justifications of copyright and copy ownership. The significance of *Théberge* on the limits that copy ownership can set on the ownership rights of the copyright holder cannot be underestimated.

IV. Conclusion

In this chapter I looked at the nature of commercial copies of copyright works from a property theory perspective and presented the theoretical justifications that can help define their scope, i.e., the *prima facie* normative force of ownership freedoms, the specific role that copy ownership plays in the instrumental design of copyright, as well as greater transaction efficiency for both copyright holders and consumers.

Improving our understanding of the nature and proper scope of rights of commercial copies of copyright works sets the balancing act within copyright law into motion, beyond rhetoric and aspiration goals. It seeks to *counterbalance* the traditionally copyright-holder-centric framework of

²¹⁴ *Ibid* at paras 31- 32.

copyright law. As I discussed in Chapter 3, some of the so-called users' rights (e.g., the non-substantial-part doctrine, fair dealing) are of limited appeal for copyright consumers, while other users' rights remain limited in scope.²¹⁵ The purpose of this chapter was to show how ownership of commercial copies of copyright works creates a distinct relationship between copyright consumers and copyright holders that deserves more attention in copyright law. I also believe that a better understanding of the nature, theoretical justifications, and dynamics of ownership of commercial copies of copyright works offer a targeted approach that can deal more effectively with copyright consumers' claims than can broader public policy or public domain considerations.²¹⁶ The analysis of the nature of copy ownership and its possible theoretical justifications that I presented here will serve as the basis for, as well as be enriched by, the application of consumer law and theory to assert copyright consumers' rights further.²¹⁷

In copyright law theory there is controversy around the qualification of copyright as property.²¹⁸ At the same time, commercial copies of copyright works have generally been assimilated to a form of personal property.²¹⁹ A closer look into the nature of ownership of commercial copies of copyright works informs us that the controversy is misplaced. It is the qualification of the copy of the copyright work as property that is becoming increasingly problematic. The non-ownership property interest of copyright holders to *interfere* with commercial copies of copyright works continues to expand,²²⁰ transfiguring commercial copies of copyright works into an increasingly peculiar form of property.²²¹ The *prima facie* open-ended powers and privileges and self-seekingness characteristics of ownership are constrained to a large extent, and lead, in some cases, to the disqualification of commercial copies of copyright works as property.²²²

²¹⁵ E.g., the private copying regime, the non-commercial user-generated content and the reproductions for private purposes exceptions to copyright infringement: see the discussion in Chapter 3, in particular Part II..

²¹⁶ As Waldron, "From authors to Copiers" *supra* note 89 at 117 observed: if broad public policy arguments are the only counter balance to the private property of the copyright holder, we may be leaving out of the picture those who are directly and immediately affected by the enforcement of the property rule, "those to whom, above all, a justification of property is owed." See the discussion on the place of users and consumers in copyright law in the context of public interest and public domain considerations in Chapter 2 Part II.

²¹⁷ See in particular, the discussion in Chapter 8 on the treatment by sale of goods and consumer law on the nature of commercial copies of copyright law.

²¹⁸ See the discussion in Chapter 5 Part III and Part IV.

²¹⁹ See the discussion in Part II of this chapter.

²²⁰ See the discussion on the expansion of copyright in Chapter 5 Part II and on the non-ownership proprietary interest within copyright in Part IV B of the same chapter.

²²¹ See the discussion in Part II of this chapter.

²²² *Ibid.*

I applied theoretical justifications to help determine what the proper scope of copy ownership should be and in an effort to de-trivialize the nature of copy ownership and the rights of copy owners. What surfaces from this exercise is that copy owners may be getting less and less of what they should expect through their juridical relation with the resource they own. The justifications of copy ownership are much intertwined with the justifications of copyright. Too much disregard of the interests of copy owners at the expense of copyright holders is unjustified and, as a consequence, undermines the coherence and credibility of copyright and, over time, its legitimacy. In the next chapter, I will apply the property principles and theoretical justifications that I have developed so far²²³ and see how they can effectively mediate between the property rights of copy owners and the property rights of copyright holders in accordance with their respective property-specific justice reasons.²²⁴

²²³ I.e. in Chapter 4, Chapter 5 and throughout this chapter.

²²⁴ Harris, *supra* note 1 at 168.

Chapter 7

The Mediating Solutions within Property

I. Introduction

The application of property law and theory to copyright and commercial copies of copyright works that I presented in Chapters 4 through 6 provides important insights into their respective scope and interaction within the heteroclit domain of property.¹ The application of property law and theory also situates copyright and copy ownership as two competing property rights in the same object. This chapter serves the double function of concluding the property theory part of my thesis² by applying the available tools to help resolve inherent conflicts between the competing property rights of copyright holders and those of copy owners with respect to the copyright work. It also bridges the regime of property law to the contractual regime, which is the main focus of the Third Part of my thesis.³ These two functions are achieved through the application of property-limitation rules on the one hand and of the *numerus clausus* principle on the other. In Part II, I apply the concept of property-limitation rules to describe how copyright acts as a property-limitation rule for the ownership rights in the copy. In Part III, I apply property-limitations rules to an area that has been much less explored, i.e., the extent to which copy ownership limits (or should limit) copyright. The analysis spans from a legal and normative approach dictated by the specific scenario to which I apply the property-limitation rule. In Part IV, I look at how the standardization of property, as it is reflected by the *numerus clausus* principle, can help maintain copyright and copy ownership truer to their core objectives and justifications by constraining the shift of powers brought on by prevailing standard contract practices. In Part V, I conclude on the contribution of property law and theory to the illumination of contemporary debates on and conflicts between copyright and copy ownership as they have been discussed in Chapter 4 through Chapter 7.

¹ I.e., within the Second Part of my thesis: The Application of Property Law and Theory to Copyright and Commercial Copies of Copyright Works (Chapter 4 to Chapter 7).

² *Ibid.*

³ The Third Part of my thesis: The Application of Consumer Law and Theory to Commercial Copies of Copyright Works (Chapter 8 to Chapter 11).

II. Copyright limitative effects on commercial copies of copyright works

The bundle of exclusive rights conferred by Canada's *Copyright Act* [CCA]⁴ on the copyright holder sets limits on the property rights of copy owners.⁵ Moral rights operate in the same manner.⁶ Characterizing copyright as a limitation on the individual private rights of consumers is not trivial. As Jeremy Waldron notes: "It sounds a lot less pleasant if, instead of saying we are rewarding authors, we turn the matter around and say we are imposing duties, restricting freedom, and inflicting burdens on certain individuals for the sake of the greater social good."⁷ What is the exact nature of copyright limitations under property law and theory and what insights can we gain therefrom? We can quickly dismiss the most extreme form of property limitation, namely expropriation rules. It would be far fetched to deem as such the effect of copyright on copy ownership, except perhaps in some very specific cases.⁸ The use privileges are already taken out from consumers' ownership rights when they purchase copies of copyright works, as opposed to a removal occurring after consumers become owners of copies.⁹

⁴ *Copyright Act*, RSC 1985, c. C-42.

⁵ See the discussion in Chapter 6 Part II.

⁶ In Canada, moral rights refer to the right to the integrity of the work and the right to be associated with the work, which can be invoked by authors only, i.e. physical persons, and not copyright holders who are not the authors: *CCA*, *supra* note 4, s 14.1(1). The extent to which moral rights of authors (as opposed to copyright holders) act as limitations to the ownership rights in the copy of a copyright work is not the focus of this chapter, as we are dealing with copyright works usually held by copyright holders (such as film production or music label undertakings) who in Canada do not have entitlements to moral rights, in a consumer market, after the first publication of the copyright work has occurred. In that context, moral rights issues would more likely occur between the author and the copyright holder to whom the copyright was transferred or licensed.

⁷ Jeremy Waldron, "From Authors to Copiers: Individual Rights & Social Values in Intellectual Property" (1993) 69 *Chicago-Kent Law Review*, 841, in David Vaver, ed., *Intellectual Property Rights, Critical Concepts in Law* (London: Routledge, 2006) Vol.I, 114, at 129.

⁸ For example, through the application of technological protection measures or digital rights management, some usages could be restrained a posteriori. In such cases, the expropriation or confiscation analogy could be plausible.

⁹ For expropriation to occur, the rightful owner would normally need to have had benefits conferred that were taken away from her. In the case of copyright, it operates as a limit on the owners' rights from the beginning.

The qualification of copyright as a property-independent prohibition¹⁰ also needs to be rejected. Copyright is opposable to all and, therefore, it imposes limitations on anyone in possession of or accessing a copy of the copyright work, independently of whether the person owns that copy or not. This could be an argument for characterizing copyright as a property-independent prohibition.¹¹ What would follow is that the use privilege and power limitations imposed by copyright on copy owners would not even be *prima facie* part of copy owners' ownership entitlements. Their ownership rights would be to no avail to contest limited usage rights on the copies, e.g. of musical works or films. They would need to find solace on other moral or legal grounds. This characterization needs to be rejected for the following reasons. First, the fact that copyright is opposable to all is a confirmation of the property right that Parliament created in favour of private or public entities.¹² Second, the restrictions imposed by copyright on copy ownership go to the heart of the open-ended privileges and powers of the copy owners. Two examples illustrate that point for our discussion purposes: an electronic book in which the copyright has expired after purchase, and a laptop not protected by any relevant intellectual property right.¹³ As an owner of the laptop, the consumer can photograph it, use it in a film, lend it or sell it to a friend, use it for or incorporate it in an art work, bring it to their family business, and use it in a profit-driven activity. They can even start a new line of business making similar laptops.¹⁴ For all these activities, consumers do not need to ask permission of the store that sold the laptop, nor is it written in any contract that they are allowed to do these things. As an owner of a laptop, the consumer has the power and privilege to perform all these acts, as well as an open-ended list of other uses. In the second example, compare an electronic book protected by copyright with an electronic book for which all copyright has expired after the copy was purchased. In that case, consumers can make as many copies as they wish for time- or space-shifting purposes, give it to friends, post it on the Internet. They can convert it into a play or reproduce substantial parts and incorporate it in other works. All these acts would be restrained if the copyright had not expired.¹⁵ Once again, the list of powers and privileges is open-ended and consumers do not need to ask permission of anyone, nor is

¹⁰ I.e. prohibitions that effectively limit the open-ended use privileges of an owned resource regardless of the status of ownership: see the discussion on property limitations in Chapter 4, Part V.

¹¹ *Ibid.*

¹² The property attributes of copyright are discussed in Chapter 5 Part IV.

¹³ The laptop would most likely bear a trademark. It may or may not be protected by an industrial design or patent.

¹⁴ Except for the trademark under which the laptop is sold and subject to applicable patents or industrial designs. This last example takes us outside the realm of our discussion centered on the consumer.

¹⁵ Subject to the application of specific limitations to the exclusive rights of copyright holders including fair dealing.

there any contract that tells them that they can perform all of these acts. They simply can, as owner or possessor of the copy of the electronic book *in which copyright has expired*.

These two examples signal that copyright acts as a property-limitation rule rather than as property-independent prohibition. The limitations imposed by copyright are part of copy owners' *prima facie* open-ended privileges and powers as owners of the copy of a copyright work, but are being taken away from them, to varying degrees and under different conditions, for the duration of the term of copyright. Copyright limitations have everything to do with constraining otherwise *prima facie* open-ended ownership rights in the copy. The fact that copyright is opposable to all, including non-owners who come into possession of a copyright work, does not exclude that it operates as a property-limitation rule. Such rules extend to lawful possessors of the copy of a copyright work vested with open-ended use privileges, not just to owners.¹⁶ Finally, this property-limitation rule is primarily intended to benefit the private interests of the copyright holder, although from an instrumental perspective, copyright is also intended to benefit consumers and the public, as it presumably encourages the creation and dissemination of copyright works.¹⁷

The characterization of copyright as a property-limitation rule provides critical insights into the legal nature of copyright, of commercial copies of copyright works, and the interaction between the two. First, it brings the normative force of ownership freedoms in the copy of the copyright work forward, and takes them out of the shadow of copyright to which they have been traditionally relegated, as an afterthought and by default of the application of copyright law. Second, it brings out the expansive and invasive nature of copyright's bundle of limitations on the *prima facie* open-ended privileges and powers of the ownership rights in the copy of the copyright work. To have overlooked this rather

¹⁶ James W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996) at 34.

¹⁷ On the one hand, the limitation copyright imposes on the property rights of the commercial copy of a copyright work is for the immediate benefit of the private interests of the copyright holder. On the other hand, such benefits arguably act as a "temporary proxy" (on a related idea of copyright holders' holding the balance between authors and users, see in David McGowan, "Some Copyright Consumer Conundrums" in *Consumer Protection in the Age of the "Information Economy"* (Aldershot: Ashgate Publishing Ltd., 2006) at 155) to a greater public interest, as they encourage the creation and dissemination of copyright works that will moreover eventually fall in the public domain. Still during the life of the exclusive rights conferred by copyright, individual moral entitlements favouring the private interests of copyright holders have made their way in policy design: Waldron, *supra* note 7 at 120. One of the side effects is the increasingly generous duration of the exclusive right granted by law to copyright holders (for example in the U.S. and in Europe)

obvious legal characterization before may, as I argued above, explain in great part the skepticism, disbelief, and rebellion that we witness in copyright consumers on the scope of their users' rights and actual end goals of copyright laws.¹⁸ The tension is likely to increase as the potential for the list of *prima facie* open-ended privileges and powers of consumer uses is expanding with increasing capabilities of network and reproduction technologies. Third, well-established property rules – in particular property-limitation rules – abound and provide a cogent framework to mediate between two competing property claims (which, in this case, are pertaining to the same copyright work).

To use the example of the tort of nuisance, for plaintiffs to be successful in a property tort of nuisance case, not only do they need to show that they have suffered a harm from the defendant property owners, they must also establish that the defendants have caused it by going above and beyond what is necessary for them to have the natural use of their own property.¹⁹ The property positive and negative externalities are assessed on equal terms for the plaintiff and defendant property owners and measured against each other. From a normative standpoint, giving due weight to the *prima facie* ownership freedoms in the copy of a copyright work requires such a balancing exercise. Copyright as a limitation on the ownership rights in the copy of a copyright work would be justified only in so far as the contested use of the copy is an unreasonable exercise of ownership that caused harm to the copyright holder.

One property nuisance case that illustrates the breadth of exclusionary powers inherent in property and how courts need to mediate between two seemingly competing exercises of ownership rights is the judgment by the High Court of Australia in *Victoria Park Racing and Recreation Grounds Co. Ltd. v. Taylor* [*Victoria Park*].²⁰ The plaintiff, owner of the Victoria Park racecourse, sought an injunction against defendant Taylor, who owned adjacent property and who had installed wooden platforms to see the racecourse and the notice boards with information about the races (and against Angles who stood on the platform and commented about the race over the telephone, and a broadcasting company that broadcasted the comments of Angles). Such alleged nuisance was caused

and their increasing de jure powers to control that right. In that light, public interest considerations play a secondary role during the term of a copyright work.

¹⁸ Joseph P. Liu, "Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership" (2001) 42 William and Mary Law Review, 1245 at 1365 argues that to make every act with respect to a digital copy an infringing act of copyright will increase the disrespect of the public for copyright law.

¹⁹ Harris, *supra* note 16, at 34, citing: *West Cumberland Iron and Steel Company v Kenyon* [1879] 11 Ch. D 782 at 787.

by the “unnatural” use of the adjacent land by Taylor and others. The Australia High Court dismissed the plaintiff’s appeal from the Supreme Court of New South Wales in a three-to-two decision.

Although there was uncontested evidence that plaintiff lost revenues as a result of the defendants’ use of the adjacent land, the court found no interference with the use and enjoyment of the plaintiff’s land. Qualifying the defendants’ actions as providing a competitive entertainment, Latham J. continued:

The facts are that the racecourse is as suitable as ever it was for use as a racecourse. What the defendants do does not interfere with the races, nor does it interfere with the comfort or enjoyment of any person who is on the racecourse ... I am unable to see that any right of the plaintiff has been violated or any wrong done to him. Any person is entitled to look over the plaintiff’s fences and to see what goes on in the plaintiff’s land. Further, if the plaintiff desires to prevent its notice boards being seen by people from outside the enclosure, it can place them in such a position that they are not visible to such people.²¹

The outcome of this case does not necessarily lead to one party limiting the *prima facie* open-ended ownership rights of the other *per se*, on the ground that the court found no loss of enjoyment by the plaintiff of his property. In other words, the activities and even profits made by Taylor and others, leading to a loss of profit by the plaintiff, were not within the realm of the property rights of the plaintiff.

From a property-limitation rule perspective, *Victoria Park* can also illustrate how *prima facie* open-ended privileges and powers, including the power to derive profits from one’s property, can be limited by other competing *prima facie* open-ended privileges and powers, e.g., here, of defendant Taylor (and others), the adjacent property owner. It also illustrates how co-existing exercises of ownership rights can benefit or have negative effects on one and other, without one party being liable to the other for the benefits she obtained from the other owner’s property (in this case, defendants’ profits resulting from commenting on the races that took place on the plaintiff’s adjacent property, even though it was demonstrated that the plaintiff lost profits from defendant’s activities), provided that each party acted within the normal exercise of their ownership rights.²²

²⁰ (1937) 58 C.L.R. 479 (Australia HC).

²¹ *Ibid*, reasons delivered by Latham J.

²² For a detailed analysis of *Victoria Park*, *supra* note 20, and its significance in property law and theory, particularly on the limits of the power to exclude, see: Kevin Gray, “Property in Thin Air” (1991) 50 Cambridge L.J. 252 at 264ff.

Victoria Park provides an important property law perspective on the expansion of copyright within the property institution. There is a prevailing assumption that any benefits and enjoyments that are derived from the copyright works ought to be considered within the exclusive domain of copyright holders.²³ *Victoria Park* informs us that this assumption with respect to other tangible private property is wrong.²⁴ Under the *CCA*, copyright holders can invoke one of their exclusive rights, such as the exclusive right to reproduce or to telecommunicate to the public the copyright work, to limit the ownership rights in the copy of the copyright work.²⁵ Only in instances where the alleged act is not within the list of exclusive exclusionary rights conferred on copyright holders, such as was the case in *Théberge v. Galerie d'Art du Petit Champlain inc [Théberge]*,²⁶ or if we reframe copyright law by giving more weight to the ownership rights in the commercial copies of copyright works, does the meditation of conflicting ownership rights as illustrated in *Victoria Park* bear some relevancy.²⁷

Property law and theory provide other insights into the limits of copyright, which have ramifications above and beyond the fate of ownership rights to commercial copies of copyright works. For instance, as a property institution, copyright should not extend beyond its underlying property-specific justice reasons.²⁸ Under the prevailing view that copyright is justified predominantly by instrumental reasons to incent creations and the dissemination of works, and given the specific scope of my thesis,²⁹ this subjects copyright to constant revisions and attacks, e.g., to the extent that incentives are no longer necessary, or that the breadth of its rights would undermine its underlying public policy considerations.³⁰ Indeed, unlike other forms of traditional tangible private property, which are not

²³ This is illustrated inter alia by the broad interpretation that courts have typically given to copyright infringement occurring upon the production, reproduction or performance in public of a “substantial part” of the work: see Chapter 3 Part II A. Marc A. Lemley, “Property, Intellectual Property and Free Riding” (2005) *Texas L. Rev.* 1031 at 1044 observes that courts tend to qualify any benefit derived from the positive externalities of copyright as “free riding” leading to copyright infringement, on the underlying assumption that such benefits are necessarily unjust. See more generally, the discussion in Chapter 5 Part IV.

²⁴ *Supra* note 20.

²⁵ See the discussion in Chapter 5 Part IV B.

²⁶ 2002 SCC 34.

²⁷ See the discussion in Part IV of this chapter.

²⁸ *Théberge*, *supra* note 26 at paras 30-32. See the discussion on the relevant underlying theoretical justifications of copyright in Chapter 6 Part III, whereby I refer to instrumentalism as being the prevailing theory invoked to justify copyright and whereby I argue that instrumentalism justifications of copyright include the promotion of innovation and creativity of copyright consumers, not solely of creators of works protected by copyright.

²⁹ Namely because we are dealing with the mass-market commercialisation of copyright works after the first publication of the work has occurred.

³⁰ Harris, *supra* note 16 at 298; Peter S. Menell, “The Property Rights Movement’s Embrace of Intellectual Property: True Love or Doomed Relationship?” (2007) 34 *Ecology L.Q.* 713 at 752 refers more generally to

intended to benefit the public *a priori*,³¹ the specific goals behind the creation of copyright as private property include the incentive to create and disseminate works *for* the benefit of the public. Thus, while the self-seekingness aspect in copyright is present as a result of its private property nature, it needs to be interpreted within, and is constrained by, this important constitutive public interest parameter.³² Finally, the property rights of copyright should not extend beyond what the property institution can or should conceptually and practically support. In addition to a consumer being rightfully entitled to certain open-ended uses and privileges over the copy of a copyright work, and to the copyright holder being rightfully limited in having any claim on those uses (or trespassory rights), it would be impractical as much as it would be inefficient to go after every instance of personal use of copyright works that is made on the Internet and elsewhere with network and copying device capabilities. Without constituting an argument in itself, the practicality argument helps corroborate the above normative analysis to the consumer and copyright holder's rights. It also signals instances where property owners (i.e., copyright holders) may be seeking powers and privileges that go beyond what their property rights can justify.

III. Ownership in commercial copies of copyright works as a property-limitation rule of copyright

The poor articulation of copy ownership in our current laws³³ leads to a lack of clarity around the extent to which they can or should effectively limit the ownership rights of copyright holders. To the same extent that copyright acts as a property-limitation rule to copy ownership,³⁴ a much less-explored terrain is the extent to which copy ownership also operates as a limitation on the ownership

intellectual property design needing some "breathing space" if it is to serve its function to incent creation and innovation properly.

³¹ While they may need to accommodate community interests in specific circumstances such as compliance with heritage municipal by-laws. See Gregory S. Alexander, "The Social-Obligation Norm in American Property law" (2008-2009) 94 Cornell L. Rev. 745, more specifically at 795-796.

³² Menell, *supra* note 30 at 752-753 refers to intellectual property's interdependence with public information and with other pre-existing works to allow for the creation of new intellectual property rights. An optimal system for the protection of intellectual property as the motor to creativity and innovation needs to be open to societal and technological changes. The sharing culture that is more and more prevalent within intellectual property is unlikely to support traditional tight ownership and control powers.

³³ See more generally the discussion about the lack of clarity on the place of users in copyright law in Chapter 2 and on the legal nature of copy ownership of commercial copies of copyright works in Chapter 6 Part I and Part II.

³⁴ See the discussion in Part II of this chapter.

rights of copyright holders.³⁵ To explore this further, I look at this interaction as a property-limitation rule, for the same reasons that copyright is better described as a property-limitation rule of copy ownership than as an expropriation rule or as a property independent prohibition.³⁶ This should come as no surprise. It attests to the interdependence between copyright holders and copy owners. The former cannot earn a living without the latter and the latter cannot enjoy literary, musical, and other works without the former. For Gregory S. Alexander, this interdependence justifies obligations to one and other.³⁷

An investigation into how copy ownership acts as a “property-limitation rule” is both legal and normative. It is legal in that it provides an analytical tool under the current law to mediate between the ownership rights in commercial copies of copyright works and the exclusive rights of copyright holders when the rights of the latter are not clearly defined, and to determine the rights of the former within the current scheme of the *CCA*. It is normative by its application of property-limitation rules to justify broader open-ended freedoms and powers, as they relate to copy ownership, than are currently permitted by the present scope of copyright holders’ exclusive rights.

A. Legal analysis of copy ownership as a property-limitation rule of copyright

Three scenarios exemplify how copy ownership acts as a property-limitation rule of copyright to mediate between the competing rights of copyright holders and copy owners: when the scope of copyright is unclear, when the exhaustion or first sale doctrine applies, and with respect to the

³⁵ Séverine Dusollier, *Droit d’auteur et protection des oeuvres dans l’univers numérique*, 2d ed. (Bruxelles: Larcier, 2007) [Dusollier 2007] at 377-418 explores how the property rights in the physical embodiment of a copyright work limit the exclusive rights of copyright holders. She notes, *ibid* at 383: “le monopole de droit qu’est le droit de propriété sur l’objet corporel, devient réservation de fait sur l’oeuvre, objet incorporel”. The author also generally discusses how the interaction between the rights in the embodiment and the copyright is evolving as the physical support or embodiment of copyright works “dematerializes”: *ibid*.

³⁶ See the discussion in Part II of this chapter as to why copyright is unlikely to qualify as an expropriation rule or as an independent property-limitation rule of copy ownership and why it shares the attributes that are common to property-limitation rules. This is not to suggest that copy ownership does not also entail property-independent prohibition rules that are distinct from the exclusive rights of copyright holders.

³⁷ Alexander, *supra* note 31 at 812: “The existence of multiple and overlapping communities in the world of copyright means that the copyright owner or license holder, because of their dependency on members of their communities, owes obligations to a wide range of persons to nurture the capabilities necessary for those persons to flourish. It also means that as members of those wide and ever-expanding networks flourish, the artists themselves flourish by virtue of the feedback effects of flourishing networks. The overall effect of the social obligation, then, is synergistic.”

unlimited power and privilege to play, view, listen to, or read copyright works. I examine those three cases in the same sequence.

(i) The scope of copyright is unclear

The *Théberge* judgment is a good illustration of the application of property-limitation rules to copy ownership and copyright. In that case, the issue was whether or not the transposition of lawful copies of paintings onto canvasses was an unauthorized production or reproduction of the paintings of Claude Théberge, and whether or not it was an infringement of his copyright. The lawful ownership rights of the copies of the paintings were asserted by the appellants (various art galleries) against the exclusive rights of respondent Claude Théberge in the paintings. The appellants purchased copies of the paintings in the open market from a publishing firm that was the licensee³⁸ of artist Claude Théberge, and not a party to the action.³⁹ There was no explicit contractual licence between Claude Théberge and the appellants (nor between the latter and the publishing company).

Binnie J. for the majority held that the appellants did not infringe the copyright of Claude Théberge in his paintings. Commenting on the dissenting opinion's interpretation of the exclusive rights of the copyright holder (as including the act of transposing the copy of the paintings from a cardboard to a canvass), Binnie J. stated: "In my view, with respect, this expansive reading of the s. 3(1) economic rights tilts the balance too far in favour of the copyright holder and insufficiently recognizes the proprietary rights of the appellants in the physical posters which they purchased."⁴⁰

Théberge is one example of upholding the *prima facie* open-ended privileges and powers of an owner in the copies of the paintings as a property-limitation rule setting limits to the *prima facie* open-ended privileges and powers of artist Claude Théberge.⁴¹ As Binnie J. stated for the majority: "Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the

³⁸ The licence did not explicitly authorize or forbid the acts performed by the appellants purchasers of the copies from the licensee: *Théberge*, *supra* note 26 at paras 12-14. This is relevant only in so far as it could have provided some evidence of Claude *Théberge* having relinquished his rights to the publishing company.

³⁹ The printing license between Claude Théberge and EGI Dutil did not preclude the subtraction act which is alleged to infringe the copyright of Claude Théberge: *Théberge*, *supra* note 26 at para 13.

⁴⁰ *Théberge*, *supra* note 26 at para 28 .

⁴¹ See the discussion on the nature of copyright in Chapter 5 in particular Part IV.

author, to determine what happens to it.”⁴² The copy ownership rights of the appellants were assessed and brought to the fore in a manner that pressed the Court to look into the scope of the *prima facie* open-ended privileges and powers of copyright. The ownership rights of the appellants in reproductions of Claude Théberge’s paintings acted as a property-limitation rule on the copyright of artist Claude Théberge. The exercise involved a balancing act between the values taken to be inherent in ownership freedoms in relation to the owned copies of the paintings on the one hand, and copyright in the paintings on the other.⁴³ The valid exercise of ownership freedoms by the appellants effectively set a limit on the undefined or open-ended contours of artist Claude Théberge’s exclusive ownership rights in the paintings. *Théberge* illustrates how copy owners are not on equal footing with other copyright users accessing copyright works: their property rights in the physical embodiment of copyright works confers on them privileges and powers that effectively limit copyright holders’ exclusive rights.⁴⁴

In addition to addressing situations where the scope of copyright holders’ exclusive rights is unclear, I explore next the extent to which the exhaustion or first sale doctrine is another manifestation of how copy ownership acts as a property-limitation rule of copyright.

(ii) The exhaustion or first sale doctrine

The exhaustion or first sale doctrine is a good illustration of how the ownership of commercial copies of copyright works acts as a property-limitation rule on the exclusive rights of copyright holders. As I discussed in Chapter 3, the exhaustion or first sale doctrine is the rule by which once the first sale (or other transfer of ownership) of physical objects embodying copyright works (such as a book, DVD, or a music CD) has occurred with the authorization of copyright holders, the copyright holders cannot dictate the fate of subsequent transfers of that object.⁴⁵ Once copyright consumers become lawful owners of commercial copies of copyright works, the exhaustion or first sale doctrine limits copyright holders’ exclusive rights to control their subsequent sales to allow consumers to exercise one of the basic ownership rights, i.e., to transfer the copies to another person.

⁴² *Théberge*, *supra* note 26 at para 31.

⁴³ Harris, *supra* note 16 at 90.

⁴⁴ Dusollier 2007, *supra* note 35.

⁴⁵ The exhaustion or first sale doctrine pertains to copyright holders’ exclusive distribution rights as it is discussed in Chapter 3 Part II F.

I discussed in Chapter 3 how the future of the exhaustion or first sale doctrine future is imperilled. First, the exhaustion or first sale doctrine is threatened by prevailing commercial practices of copyright holders to circumvent its application and retain control over subsequent transfers of commercial copies of copyright works.⁴⁶ Second, the instances where the exhaustion or first sale doctrine comes into play are decreasing under the predominant view that it does not apply to commercial copies distributed online with no supporting tangible object.⁴⁷

To support my claim that the exhaustion or first sale doctrine acts as a property-limitation rule of copyright holders' exclusive rights and that it should be maintained with respect to commercial copies distributed online, I will first review the three main theoretical justifications of the exhaustion or first sale doctrine and explain why the most convincing theory is grounded in the property rights of copy owners as supported by other theories. I will then argue that the property theory is still applicable as the core justification of the application of the exhaustion or first sale doctrine with respect to digital copies distributed online.

The first frequently invoked justification of the exhaustion or first sale doctrine is the property theory.⁴⁸ It revolves around the need to reconcile copyright holders' exclusive copyrights and buyer's ownership rights in the commercial copy.⁴⁹ I include under this theory the justification based on the

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Herman Cohen Jehoram, "Prohibition of Parallel Imports Through Intellectual Property Rights" (1999) 30 *International Review of Intellectual Property and Competition Law* 495 at 497-500; André Lucas, "International exhaustion" in Lionel Bently, Uma Suthersanen & Paul Torremans, eds, *Global Copyright Three Hundred Years Since the Statute of Anne, From 1709 to Cyberspace* (Cheltenham: Edward Edgar Publishing, 2010) 304, at 306; Andreas Wiebe, "The economic perspective: exhaustion in the digital age" in Lionel Bently, Uma Suthersanen & Paul Torremans, eds, *Global Copyright Three Hundred Years Since the Statute of Anne, From 1709 to Cyberspace* (Cheltenham: Edward Edgar Publishing, 2010) 321, at 322; Tomasz Targosz, "Exhaustion in digital products and the "accidental" impact on the balance of interests in copyright law" in Lionel Bently, Uma Suthersanen & Paul Torremans, eds, *Global Copyright Three Hundred Years Since the Statute of Anne, From 1709 to Cyberspace* (Cheltenham: Edward Edgar Publishing, 2010) 337 at 340,344; Pierre-Emmanuel Moyse, *Le droit de distribution: Analyse historique et comparative en droit d'auteur* (Cowansville, Qc: Yvon Blais, 2007) at 426-427.

⁴⁹ *Ibid.* See also: Aaron Perzanowski & Jason Schultz, "Digital Exhaustion"(2011) 58 *UCLA L. Rev.* 889 at 909-910; Jeremy de Beer and Robert Tomkowicz "Exhaustion of Intellectual Property Rights in Canada" (2009) 25 *C.I.P.R.* 3, at 18 who refer to a tool to calibrate copyright holders rights to the use of a physical object embodying the work.

English common law rule against restraints on alienation of property⁵⁰ and similar doctrines in civil law jurisdictions.⁵¹

Restrictions on alienation of property have always been treated with suspicion in property law, especially in the case of chattels.⁵² The landmark US Supreme Court judgment *Bobbs-Merrill Company v. Isidor Straus [Bobbs-Merrill]*⁵³ is one of the earlier articulations of the exhaustion or first sale doctrine that illustrates that reticence. The copyright holder Bobbs-Merrill Company sued Isidor Straus for copyright infringement, claiming that its copyright in the book entitled the right to regulate the price of subsequent sales of books subject to its copyright by a notice affixed on the book. In effect, the copyright holder was claiming that its property rights extended to a power to exclude all subsequent sellers and purchasers who did not comply with the price notice. The US *Copyright Act* as it was in force at the time did not spell out such exclusive rights for copyright holders.⁵⁴ The Supreme Court referred to the rule against restraints of the alienation of property when applying a strict statutory interpretation of the rights that the US *Copyright Act* conferred on copyright holders.⁵⁵ The Court framed the question to be answered as follows:

What does the statute mean in granting “the sole right of vending the same?” Was it intended to create a right which would permit the holder of the copyright to fasten, by notice in a book or upon one of the articles mentioned within the statute, a restriction upon the subsequent alienation of the subject-matter of copyright after the owner had parted with the title to one who had acquired full dominion over it and had given a satisfactory price for it? It is not denied that one who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it. The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish

⁵⁰ The English common law rule against restraints on alienation of property has been invoked in the US as the historical and policy justification for the existence of the first sale doctrine: U.S. Copyright Office, A Report of the Register of Copyrights pursuant to section 104 of the DMCA (2001) online: http://www.copyright.gov/reports/studies/dmca/dmca_study.html [DMCA 2001 Report] at 20, 86. See also Liu, *supra* note 18 at 910-911. The Supreme Court of Canada invoked the common law doctrine with respect to restraint of trade and free competition by applying the exhaustion principle to trade-marks in *Consumers Distributing Co v Seiko Time Canada Ltd.*, [1984] 1 S.C.R. 583 at para 26.

⁵¹ See Lucas, *supra* note 48 at 306; Wiebe, *supra* note 48 at 322 where the author refers to this justification as the “marketability theory.”

⁵² For a discussion on the law of servitudes and how it has been applied on chattels, and its relevancy to interpret current restrictive terms of copyright, see: Molly Shaffer Van Houweling, “The New Servitudes” (2008) 96 Geo. L.J. 885 at 906ff.

⁵³ 210 U.S. 339, 28 S.Ct. 722 (1908). The first sale doctrine was codified in the year following *Bobbs-Merrill* and carried forward in the Copyright Act of 1976 and is presently found in 17 USC §109 (a).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, at 349-351.

a new edition of it.⁵⁶

Having found that the right to sell as defined by the statute was silent on granting such powers to copyright holders, the Court dismissed the copyright holder's claim and found that there had been no infringement of copyright.⁵⁷ The holding in *Bobbs-Merrill* was thereafter codified in the US *Copyright Act*.⁵⁸

Under the property theory, the exhaustion or first sale doctrine is justified by the ownership in the copy imposing an outer limit on the competing exclusive rights of copyright holders in the same object, e.g., the copyright work. The exhaustion or first sale doctrine is one example of a property-limitation rule that is specific to the effects of copy ownership on copyright holders' exclusive rights. For the exhaustion or first sale doctrine to apply, a lawful transfer of ownership in the commercial copy needs to take place.⁵⁹ The exhaustion or first sale doctrine recognizes and delineates the effects of the ownership rights of purchasers in the tangible embodiment of copyright works and sets them against the exclusive rights of copyright holders. The absence of the exhaustion or first sale doctrine would lead to the denaturalization of the transaction through which the purchaser of the copy of a copyright work acquires the copy and his ownership rights from its bare essence. It would amount to stripping off one of the fundamental attributes of full blooded-ownership, i.e., the *prima facie* open-ended power and privilege to alienate without any duty to account to anyone.⁶⁰

In Chapter 3, I discussed the uncertainty of the application of the exhaustion or first sale doctrine when the copyright work is distributed online with no supporting physical object (e.g., a CD, a DVD, a book).⁶¹ Commentators have raised doubts about the property theory's ability to justify the

⁵⁶ *Bobbs-Merrill*, *supra* note 53 at 349-350.

⁵⁷ *Ibid*, at 350-351. The Court was also able to arrive at that conclusion by distinctively separating the nature of the rights of the copyright holder as strictly being confined to a bundle of intangible rights and not extending to their physical embodiment citing *Stephens v Cady*, 14 How. 528, 530, 14 L. ed. 528, 529, where Nelson J. stated: 'The copyright is an exclusive right to the multiplication of the copies, for the benefit of the author or his assigns, disconnected from the plate, or any other physical existence. It is an incorporeal right to print and publish the map; or, as said by Lord Mansfield in *Millar v Taylor*, 4 Burr. 2396, ['a property in notion, and has no corporeal, tangible substance.].

⁵⁸ The first sale doctrine was codified a year after *Bobbs-Merrill*, *supra* note 53 in the *Copyright Act of 1909*, s 27.17 USC §109 (a) is the present codification of the first sale doctrine.

⁵⁹ See the discussion on exhaustion or first sale doctrine in Chapter 3 Part II F.

⁶⁰ Harris, *supra* note 16 at 30.

⁶¹ See the discussion in Chapter 3 Part II F.

exhaustion or first sale doctrine when the commercial copies have no physical supporting media.⁶² This position ties in to the broader consideration of the application of the exhaustion or first sale doctrine to commercial copies that are not embedded in a physical object (e.g., a CD or DVD).⁶³ To answer this question, and based on the exigencies of the application of the exhaustion or first sale doctrine, I will explore in Chapter 8 the ramifications that the nature of digital copies distributed online have on its application, as well as the distinction between goods and services and between a sale and a licence.⁶⁴ For now, I will analyze the other frequently invoked justifications for the application of the exhaustion or first sale doctrine and the extent to which they support the property theory.

The second frequently invoked justification of the exhaustion or first sale doctrine is the need to preserve the free circulation of commercial copies of copyright works.⁶⁵ I regroup under this theory the free competition arguments, i.e., how the application of exhaustion or first sale doctrine favours the free movement of goods, which allows a secondary market that competes with the copyright holder's primary market in the same goods.⁶⁶ In the EU, the promotion of a free market within all Member States underlies the application of the exhaustion principle as it applies to various forms of intellectual property rights, including copyright.⁶⁷

I include under the theory of free circulation of copies, public policy arguments in which the exhaustion or first sale doctrine is justified on the basis that it ensures the continued free circulation of ideas, outside the control of copyright holders, allowing for a greater balance between the interests of

⁶² Targosz, *supra* note 48 at 344-345.

⁶³ See the discussion in Chapter 3 Part II F.

⁶⁴ See the discussion in Chapter 8 Part II B and C, Part III and Part IV.

⁶⁵ Moyse, *supra* note 48 at 427-432; Targosz, *supra* note 48 at 341, 344-345. The marketability theory under which the primary purpose of the exhaustion principle is to avoid inappropriate hampering of trade in copies also falls within the justification of the free circulation of commercial copies: Wiebe, *supra* note 48 at 322.

⁶⁶ *Ibid*; The competition underpinnings of the first sale doctrine have been invoked as one justification underlying the first sale doctrine in the US: DMCA 2001 Report, *supra* note 50 at 21, 86; Perzanowski & Schultz, *supra* note 49 at 895 ff. From an economic perspective, the distribution rights of copy owners enable price competition with copyright holders: Wiebe, *supra* note 48 at 323.

⁶⁷ EU, Opinion Advocate General Bot, Case C-128/11, Axel W. Bierbach, administrator of *UsedSoft GmbH v Oracle International Corp.*, 24 April 2012 at para 46. See also Targosz, *supra* note 48 at 341-342.

copyright holders, copyright users, and the public.⁶⁸ Under that theory, the exhaustion or first sale doctrine protects the “ideal” interests of users beyond their economic interests in the commercial copies and the flourishing of a “second-hand market of ideas.”⁶⁹ It also ensures accessibility to works that might otherwise no longer be available.⁷⁰

The justifications based on the free circulation of commercial copies underscore the benefits of the application of the exhaustion or first sale doctrine, but they do not provide on their own a plausible justification for its existence. While it is true that the exhaustion or first sale doctrine favours secondary markets for commercial copies lawfully transferred that compete with the primary market of copyright holders, exhaustion only applies to the exclusive right to control the distribution of copyright works.⁷¹ It does not apply to all other exclusive copyrights, including rental rights, communication to the public by communication, and other exclusive rights that allow copyright holders to retain the market control of their works with respect to a broad range of commercial offerings.⁷² First sale or exhaustion only applies after a lawful transfer of ownership of the commercial copy occurs. In that sense, the competition argument endorses the property theory discussed above by confirming that leaving the right to transfer commercial copies with subsequent lawful owners is consistent with the broader imperative of free market competition.

The justifications based on the public policy arguments favouring free circulation of commercial copies also underscore the benefits of the application of the exhaustion or first sale doctrine, but they do not provide on their own a plausible justification for its existence. Once again, first sale or exhaustion is limited in its application to lawful acquirers of commercial copies of copyright works. A broad category of users regularly access copyright works without ever falling into that category. In such instances, the public interest would be safeguarded under other doctrines, including fair dealing, fair use, non-substantial part, and non-commercial user-generated content.⁷³ The broader public

⁶⁸ Targosz, *supra* note 48 at 343. See also Moyse, *supra* note 48 at 435-442 who refers to the users’ right justification to the exhaustion or first sale doctrine that falls under the broader argument of the need to balance competing interests within copyright law.

⁶⁹ *Ibid.*

⁷⁰ EC, Parliament, DG for Internal Policies, Policies Department: Citizens’ Rights and Constitutional Affairs, “The Relations Between Copyright Law And Consumers’ Rights From A European Perspective”, by Séverine Dusollier (2010) [Dusollier 2010] at 26; Perzanowski & Schultz, *supra* note 49 at 895.

⁷¹ See the discussion in Chapter 3 Part II F.

⁷² *Ibid.*

⁷³ See Chapter 3 Part II A, C, D (i).

interest arguments (and the need to balance competing interests within copyright law) justify for their greater part not first sale or exhaustion itself, but the need to maintain the integrity of the ownership rights of copy owners by allowing them to freely transfer the commercial copies they own as part of their open-ended powers and privileges as owners of commercial copies.⁷⁴ As I argued in Chapter 6, the property rights in commercial copies of copyright works are justified by the normative values of freedom and autonomy that underlie personal property, as well as the instrumental goals of copyright to encourage the creation and dissemination of copyright works (when viewed from a broader perspective that also encompasses copyright users).⁷⁵ Those property rights include the right to transfer the commercial copy as it is safeguarded by the exhaustion or first sale doctrine.⁷⁶

Third, the idea of a just reward for copyright holders or the remuneration theory is frequently invoked to justify the existence of the exhaustion or first sale doctrine.⁷⁷ Under that theory, a right of remuneration beyond the first sale of a copy protected by copyright would go over and above a fair compensation for authors.⁷⁸ In the recent judgment *UsedSoft GmbH v. Oracle International Corp [UsedSoft]*,⁷⁹ the Court of Justice of the EU applied a concept similar to the remuneration theory.⁸⁰ Relying on former judgments by the same Court, it justified the application in the EU of the exhaustion of the exclusive right of distribution as a means to balance two competing interests: the need to avoid the partitioning of the common market with the protection of copyright holders' exclusive rights "to what is necessary to safeguard the specific subject-matter of the intellectual property concerned," in this case the online distribution of computer programs protected by copyright.⁸¹

⁷⁴ See the discussion in Chapter 4 Part II.

⁷⁵ See the discussion in Chapter 6 Part III A.

⁷⁶ *Ibid.*

⁷⁷ Lucas, *supra* note 48 at 306; Wiebe, *supra* note 48 at 322; Moyse, *supra* note 48 at 432-435; Targosz, *supra* note 48 at 341.

⁷⁸ *Ibid.*

⁷⁹ C-128/11, [2012] OJ C 287.

⁸⁰ *Ibid.*, at para 62.

⁸¹ *Ibid.* [citing: Case C-200/96 *Metronome Musik* [1998] ECR I-1953 at para 14; Case C-61/97 *FDV* [1998] ECR I-5171 at para 13; and *Football Association Premier League and Others* at para 106]. The Court concluded in that case that to limit the exhaustion of the distribution right under Article 4(2) of *Directive 2009/EC/24* solely to copies of computer programs sold on a material medium, would allow copyright holders to control subsequent sales and that such restriction "would go beyond what is necessary to safeguard the specific subject-matter of the intellectual property concerned.": *Ibid.*, at para 63 [citing *Football Association Premier League and Others* paras 105-106].

In my view, the remuneration theory fails to adequately justify the application of the exhaustion or first sale doctrine and is probably the least convincing of the theories examined so far. To establish what is a “fair reward” for each commercial copy inevitably leads to some arbitrariness. Copyright holders have the power to exercise their exclusive rights through a multitude of offerings (e.g., sale involving a CD, DVD, book, online services, online transfer of a commercial copy, rental of commercial copies for a limited duration), the majority of which do not implicate the application of the exhaustion or first sale doctrine.⁸² In *UsedSoft*, the Court invoked the need to compensate copyright holders to the degree that is necessary to safeguard their rights as one rationale leading to the application of the exhaustion principle.⁸³ The Court did not rely on a market analysis to assess whether the licences to the computer programs offered by Oracle factored in the restriction on subsequent transfers of the copies or whether, on the contrary, Oracle had obtained a fair remuneration that would not justify retaining control over the subsequent transfer of copies by users. To have done so would have required market comparisons between different commercial offerings.⁸⁴ Even then, it is unclear whether such an exercise would determine that copyright holders obtained a “fair remuneration” on their copy.

Given the limited application of the exhaustion or first sale doctrine to the exclusive distribution right of copyright holders and, consequently, the various means through which copyright holders can receive remuneration through the commercialization of their works that do not involve the application of exhaustion, the fair remuneration theory cannot on its own justify the application of the exhaustion or first sale doctrine. It seems to become even less plausible as a justification for the application of the exhaustion or first sale doctrine in an environment where the variety of ways through which copyright works are made available to consumers increases.⁸⁵ At a minimum, the fair remuneration theory cannot be applied without a case-by-case analysis of the actual reward received by copyright holders for the sale of copies of copyright works as compared to other offerings. The fair remuneration or just

⁸² The exhaustion or first sale doctrine only applies in the instance of the lawful transfer of ownership of a commercial copy to a consumer or other user: see the discussion in Chapter 3 Part II F.

⁸³ *UsedSoft*, *supra* note 79 at paras 62-63.

⁸⁴ The different commercial offerings to be compared would include factors such as whether the user has the right to transfer or not the copy, whether the use is for unlimited or fixed duration.

⁸⁵ E.g., sale of copies of copyright works, rentals, services through which copyright works are accessed without involving a sale or a rental of the copy.

reward theory does however generally support the need to balance competing interests and, therefore, to set a limit on copyright holders' remuneration for the sale of copies of their works.⁸⁶

In addition to the property theory, the free circulation of copies theories and the remuneration theory, other justifications have been invoked in support of the exhaustion or first sale doctrine.⁸⁷ They include the need to ensure legal certainty, which in and of itself does not provide a justification to the application of the exhaustion or first sale doctrine.⁸⁸ It does support the preservation of traditional powers and privilege associated with ownership, which include the ability by copy owners to transfer the copies they own. At the same time, the legal certainty argument is not likely to offer much support to copyright consumers to justify the application of the exhaustion or first sale doctrine. Owning commercial copies of copyright works is already fraught with encroachments and legal uncertainties that are not present to the same extent in other forms of personal property.⁸⁹

Because the current scope of application of the exhaustion or first sale doctrine, i.e., the fact that it applies only to the exclusive distribution right and only to copies of copyright works that have been lawfully transferred to users, the more plausible justification for its application is the property rights in the copies that are vested in lawful copy owners. From this perspective, the ownership in the copy creates a property-limitation rule on the exclusive rights of copyright holders. The free circulation of copies theories (i.e., centered around competition considerations or on the need to balance copyright holders' rights with public interest issues) and, to some extent, the fair remuneration theory and the

⁸⁶ See the discussion above in Part III A (ii) of this chapter on the circulation of copies theory and the need to preserve a balance between the interests of copyright holders and the public interest. For a contrary view, see Moyse, *supra* note 48 at 433 who argues that copyright holders should be entitled to remuneration for each and every commercial transaction of commercial copies of copyright works, without interfering however with their free circulation, rejecting the principle of exhaustion of the distribution right as it currently applies.

⁸⁷ They include the requirement for legal certainty: Targosz, *supra* note 48 at 341, 344; Perzanowski & Schultz, *supra* note 49 at 895ff. discuss other advantages of the first sale doctrine. See in particular, *ibid* at 897-898 where they refer to the protection of consumer privacy, the promotion of market efficiency and transaction clarity, the promotion of innovation, (i.e. "innovation by copyright owners to compete with secondary markets, innovation by secondary market providers, and user innovation") and platform competition (i.e. the reduction of "consumer lock-ins" who remain tied to a platform because of the high costs of switching to another provider even if the latter is more competitive and offers a superior product. The first sale doctrine allows consumers to recoup their investment through resale and to stimulate lower prices of competing platforms.

⁸⁸ The argument of legal certainty does not explain why exhaustion should favour copy owners as opposed to copyright holders: Targosz, *supra* note 48 at 341.

⁸⁹ See the discussion in Chapter 6 Part II.

legal certainty theory support the property theory even further but cannot on their own justify the existence of the exhaustion or first sale doctrine.

In Chapter 3, I discussed the uncertainty of the application of the exhaustion or first sale doctrine when the copyright work is distributed online with no supporting physical object (e.g., a CD, a DVD, a book).⁹⁰ The prevailing view is that the exhaustion or first sale doctrine does not apply to digital copies of copyright works distributed online with no physical supporting media.⁹¹ The application of the exhaustion or first sale doctrine to digital copies distributed online with no supporting physical media requires an understanding of various concepts,, including the distinction between tangibility and intangibility that I will explore in Chapter 8.⁹² For the time being, I will discuss the theoretical justifications for the prevailing view of the non-application of the exhaustion or first sale doctrine to digital copies of copyright works distributed online with no physical supporting media.

The arguments against the application of the exhaustion or first sale doctrine to digital copies distributed online with no physical supporting media rely more on technical rather than substantive considerations. They also reflect a copyright-holder-centric view of the issues at stake. Opponents to the application of the exhaustion or first sale doctrine to digital copies with no physical supporting media invoke the distinct features of digital copies: they can be reproduced with the exact same quality with no possibility of differentiating between the two.⁹³ This would likely have more adverse effects on copyright holders' ability to exploit their work than is the case with the transfer of tangible copies.⁹⁴ Under that view, owners of digital copies of copyright works distributed online with no

⁹⁰ See the discussion in Chapter 3 Part II F.

⁹¹ *Ibid.*

⁹² See the discussion in Chapter 8 Part III and Part IV.

⁹³ Wiebe, *supra* note 48 at 323, 324; Marybeth Peters, "The Legal perspective on exhaustion in the borderless era: consideration of a digital first sale doctrine for online transmissions of digital works in the United States" in Lionel Bently, Uma Suthersanen & Paul Torremans, eds, *Global Copyright Three Hundred Years Since the Statute of Anne, From 1709 to Cyberspace* (Cheltenham: Edward Edgar, 2010) 329 at 334.

⁹⁴ *Ibid.* Peters, as former U.S. Register of Copyrights at the US Copyright Office, referencing the DMCA 2001 Report, *supra* note 50 at 82-83, 89, recalls: "The Copyright Office recommendation was based on interrelated economic and practical considerations. One concern was the impact of a digital first sale doctrine on the ability of right holders to exploit their works. Works in digital format can be reproduced without any degradation in quality and transmitted rapidly with little cost. Thus digital transmissions, and the ease of pirating perfect copies, are likely to affect adversely the market for copies of a work to a greater degree than transfers of physical copies."

supporting physical media cannot exercise one of their basic powers and privileges of ownership, i.e., the right to subsequently transfer their copy to another person.

The position against the application of the exhaustion or first sale doctrine to digital copies distributed online pays no attention to the property rights and the reasonable expectations that result therefrom on the part of copy owners.⁹⁵ It looks at the general functioning of the market, from the point of view of copyright holders.⁹⁶ Second, the perfect copy phenomenon argument that is used against the application of exhaustion to digital copies of copyright works distributed online is an attribute of digital copies, not of the fact that there is no supporting physical object (e.g., a CD or DVD).⁹⁷ Third, requirements can be imposed to address the potentially detrimental effects to copyright holders' rights when exhaustion applies to digital copies. Among those, the adaptation of first sale or exhaustion of digital copies distributed online could include the requirement that the transferor not retain a copy when she transfers her copy to a subsequent purchaser.⁹⁸ Such a requirement exists in the CCA with respect to the newly introduced reproduction for private purposes right.⁹⁹ It requires lawful acquirers to destroy any reproductions made upon transfer or lease of the original copy.¹⁰⁰ The Court of Justice of the EU, in *UsedSoft*, pointed to the necessity of such requirement for copyright exhaustion to apply to computer programs distributed online.¹⁰¹

⁹⁵ DMCA 2001 Report, *supra* note 50 at 100-101 considered briefly the reasonable expectations of consumers with respect to digital copies as an argument to support the application of the first sale doctrine to digital copies of copyright works distributed online but dismissed it expeditiously, giving way to the threat that its application would represent to the exclusive rights of copyright holders.

⁹⁶ *Ibid.*

⁹⁷ CDs and DVDs of digital works can be replicated in perfect copies unless protected by technological protection measures, which can also be applied to copies distributed online.

⁹⁸ Dusollier 2010, *supra* note 70 at 26-27. In the US, see Peters, *supra* note 93 at 335, as former Register of Copyright, US Copyright Office referencing the DMCA 2001 Report, *supra* note 50 at 83-85, 97-98 raises that there were concerns around forward- and- delete type of technologies in that they did not correspond to typical uses users would make of digital copies of copyright works. Consumers would not readily delete the copy upon transfer and there was concern that it would be difficult to monitor whether this had occurred or not. See also: Evan Hess, "Code-ifying Copyright: an Architectural Solution to Digitally Expanding the First Sale Doctrine" (2013) 81 Fordham L. Rev. 1965, at 2007-2010, recommending the application of technologies allowing the degradation of digital copies overtime, to replicate the condition of physical (paper) copies.

⁹⁹ CCA, *supra* note 4, s 29.22. See the discussion in Chapter 3 Part II A (ii).

¹⁰⁰ *Ibid.*, s 29.22 (4): the right to make reproductions for private purposes includes the requirement to destroy any copies made upon transfer of the original copy.

¹⁰¹ *UsedSoft*, *supra* note 79 at paras 69-70.

The reproduction capabilities of digital copies are not a strong enough argument to discard the application of copyright exhaustion to digital copies distributed online with no physical supporting media. If it were, first sale would not apply to digital movies sold on a DVD or digital music sold on a CD. A more refined understanding of the nature of digital copies of copyright works and of technologies mimicking transfers similar to the analogue world attenuate concerns that prevailed earlier regarding the application of digital exhaustion.¹⁰² The recognition by the Court of Justice of the EU in *UsedSoft* that exhaustion or first sale doctrine applied to computer programs distributed online with no physical supporting media exemplifies this recent trend.¹⁰³

To allow the radically different treatment of digital copies distributed online from other copies, by focusing primarily on the interests of copyright holders, without considering the nature of the product and the legal transaction through which it is accessed by consumers, reflects a trivialization of copy owners' rights and interests.¹⁰⁴ It exemplifies a copyright-holder-centric approach to regulation that too often forgets the property regime from which it was elaborated and how it interacts with contracts, its principal vehicle for commercialization of works. It leads to a progressive disengagement of the law toward (consumer) information products in favour of private market forces. Left unleashed, it will deepen the void through the (de)regulation of (consumer) information products.¹⁰⁵

Adding to the uncertainty of the application of the exhaustion or first sale doctrine with respect to digital copies distributed online, the commercial practice by which copyright holders avoid its application altogether continue to undermine its application. I discuss how property law and theory can offer avenues to address this issue below in this chapter.¹⁰⁶ Before doing so, I will discuss how another open-ended power and privilege of copy ownership acts as a property-limitation rule on the

¹⁰² See *supra* note 94. Peters, *supra* note 93 at 334, as former Register of Copyrights, US Copyright Office, referencing the DMCA 2001 Report, *supra* note 50 at 98-99: "It was also not clear at the time that reliable technology existed to delete automatically the sender's copy in a forward-and-delete system." New commercial offerings including ReDigi create a market place for the resale of pre-owned digital copies of musical recordings purchased online and claim to provide a mechanism for erasing the initial copy from the seller when she transfers it to the buyer: <https://www.religi.com/>. See also the discussion in Chapter 8 Part III and IV.

¹⁰³ *Ibid.*

¹⁰⁴ See *supra* note 95.

¹⁰⁵ As I discuss in Chapter 8, the results of the radically different treatment of digital copies distributed online can be observed in the field of copyright, sale of goods, contract, consumer law and electronic commerce law. The radically different treatment of digital copies distributed online may become less attractive to knowledgeable consumers and slow down the growth in that market segment.

¹⁰⁶ In particular in Part IV of this chapter.

exclusive rights of copyright holders and the increasing importance of reinforcing that claim in a digital landscape.

(iii) The powers and privileges to play, view, listen, and read

The scope of the powers and privileges of consumers and other users to play, view, read, and listen to a copyright work is not specifically enunciated in the *CCA*. None of the exclusive rights of the copyright holder (i.e., the exclusive right to produce, reproduce, perform in public, and authorize first publication) limit those freedoms of use, at least with respect to commercial copies transferred, with no technological protection measures [TPMs].¹⁰⁷ In Chapter 3, I discussed how copyright law confers on copyright holders the powers and privileges to decide by contract how, to whom, for what duration and territory they commercially exploit their works.¹⁰⁸ I also discussed areas of uncertainty about the extent to which copyright holders can exercise their contractual freedom, particularly when it comes in conflict with the overall objectives of the property rights conferred on them by the *CCA*.¹⁰⁹ Similarly to my earlier discussion in this chapter on the application of the exhaustion or first sale doctrine,¹¹⁰ the question here is: to what extent can copyright holders alter by contract the essential attributes of copy ownership over and beyond what the *CCA* already expressly confers?¹¹¹

Traditionally, ownership in copies of copyright works has been viewed as conferring the unlimited powers and privileges to play, view, read, listen to and perform otherwise than in public a copyright work.¹¹² The consumer who owns copies of copyright works is distinct in that regard from any other consumers and users who access copyright works through other legal transactions (or the absence thereof), such as the rental of a computer program for a fixed duration, a ticket to the theatre (or an Internet streaming service) that confers to its holder (subscriber) the right to one screening (or view)

¹⁰⁷ See the discussion on technological protection measures in Chapter 3 Part III B and how their recent introduction in the *CCA*, *supra* note 4, confers new rights to copyright holders who seek to protect their works through them.

¹⁰⁸ See the discussion in Chapter 3 Part III C.

¹⁰⁹ See the discussion in Chapter 3 Part III A and Part IV.

¹¹⁰ See the discussion in Part III A (ii) of this chapter.

¹¹¹ See the discussion in Chapter 6 Part II, where I analyze how copyright confers exclusive rights to copyright holders that make commercial copies of copyright works a distinct and unique form of personal property from other goods.

¹¹² In addition to the power to transfer (e.g. sell, donate, bequeath) the ownership in the copy of the copyright work. In *Théberge*, *supra* note 26 at para 31: as Binnie J. stated for the majority: “Once an

of a film, or simply by browsing a copyright work available on the Internet. In these examples, consumers can more readily and reasonably expect that their right to use, view, listen, or in other instances read the copyright work is limited, either because of the nature of the legal transaction that took place (e.g., a rental, a service agreement, etc.) or because of the absence thereof.¹¹³ In contrast with a contract of rental or of specific services involving copyright works, when consumers own copies of copyright works they can reasonably expect that they have the *prima facie* unlimited power and privilege to use, view, listen to, and read the work with no duty to account to anyone, as they have done so for years and as they are generally able to use the goods they own for the purposes for which they were intended.¹¹⁴

At first glance, consumers' unlimited power and privilege to play, view, listen to, or read commercial copies of copyright works they own appear to be the least controversial of all claims to copy ownership, in contrast with the right to make copies, share the work on digital networks etc. Unlike the exclusive right to publish, produce, reproduce, perform in public, and, now, distribute the work, the acts of playing, viewing, listening to, and reading a work are not specifically subject to the authorization of copyright holders.¹¹⁵ Through the combined effects of the current state of the law regarding copyright holders exclusive rights,¹¹⁶ TPMs,¹¹⁷ commercial terms of use of commercial copies of copyright works,¹¹⁸ and of the uncertainty around the characterization of those transactions as sales, licences, or service contracts,¹¹⁹ the traditional unlimited privilege and power to play, view,

authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.”; Liu, *supra* note 18 at 1287.

¹¹³ For example, in the case of browsing a copyright work available on the Internet, no formal agreement took place between the user and the copyright holder that confers rights to the copy to the user on the basis of which she could build reasonable expectations.

¹¹⁴ This last point touches upon the application of implied conditions or warranties of suppliers under sale of goods or consumer laws which I discuss in Chapter 9 Part II A and in Chapter 11.

¹¹⁵ CCA, *supra* note 4 ss 3, 15, 18, 26.

¹¹⁶ In particular, under the exclusive right to authorize the reproduction of copyright works, each access a user makes to a copyright work can involve a new reproduction of the work, that necessitates the authorization of copyright holders: Liu, *supra* note 18 at 1286 observes that transposing traditional copy owner freedoms into the digital age is a delicate exercise because it directly interferes with the copyright holders' right to control reproduction of her copyright works. See also Jane C. Ginsburg, “Essay: From having copies to Experiencing works: The development of an access right In U.S. copyright law” (2003) 50 J. Copyright Soc'y U.S.A. 113, in particular at 117-118 and at 120-121 & 126.

¹¹⁷ See the discussion on the effect of technological protection measures in Chapter 3, Part III B.

¹¹⁸ See the discussion on non-negotiated standard end-user agreements for commercial copies of copyright works in Chapter 3, Part III C.

¹¹⁹ See the discussion in Chapter 8 Part II.

listen to, or read commercial copies of copyright works distributed online with no physical supporting medium is under increased pressure.

Commentators, including Jessica Litman and Joseph Liu, have noted the threat that ill-adapted copyright laws in the digital environment pose to the traditional freedom to read, view, listen to, and play copies of copyright works.¹²⁰ They argue in favour of the protection of such freedoms.¹²¹ Other scholars, including Jane Ginsburg, argue that the right of copyright holders to control each individual access to their works through TPMs is justified and critical in a digital environment, a view that supports a broad interpretation of the new access right that was introduced in the US with the entry into force of the *Digital Millennium Copyright Act [DMCA]*.¹²² Diverging views on the theoretical justifications and objectives of copyright and how they should be implemented lie at the heart of this legal and normative debate on what the proper scope of copyright exclusive rights should be. In Chapter 6, I argued that the prevailing theoretical justifications of copyright demand more room for copyright consumers and other users for copyright law to retain its coherence and legitimacy.¹²³

Qualifying the unlimited right to play, read, listen, and view as the exercise of freedom by personal property copy owners and as a “property-limitation rule” of copyright gives a whole new significance to the digital environment given the combination of TPMs, their legal endorsement, and of other

¹²⁰ Jessica Litman, *Digital Copyright* (Amherst: Prometheus Books, 2001) [Litman, 2001] at 29ff; Liu, *supra* note 18, at 1288-1289. See also Jessica Litman, “The Exclusive Right to Read” (1994) 13 *Cardozo Arts & Ent. L.J.* 29.

¹²¹ Litman 2001, *supra* note 120; Jessica Litman, “Lawful Personal Use” (2007) 85 *Tex. L. Rev.* 1871 [Litman 2007] at 1879 refers to “copyright liberties”: i.e. the fact that “copyright law was designed to maximize the opportunities for non-exploitative enjoyment of copyrighted works in order to encourage reading, listening, watching, and their cousins”. Author argues that they are “both deeply embedded in copyright’s design and crucial to its promotion of the ‘Progress of Science’”; Liu, *supra* note 18, in particular at 1237ff, argue in favour of such unlimited rights. As Liu observes, transposing these copy owner freedoms into the digital age is a delicate exercise because it directly interferes with the copyright holders’ right to control reproduction of her copyright works: Liu, *ibid* at 1286.

¹²² Pub. L. No. 105-304, 112 Stat. 2860 (1998), amending 17 USC, including the introduction of §§ 1201-1205; Ginsburg, *supra* note 116 at 117-118, 120-121 and at 126 where the author states: “...[t]he physical object ‘copy’ is distinct from the incorporeal ‘work of authorship’ that the copy embodies, and I do not access ‘the work’ until I have entered the password (from the correct computer). Thus, ‘access to the work’ becomes a repeated operation; each act of hearing the song or reading the document becomes an act of ‘access.’ When the DMCA bars circumvention of controls on access to the ‘work,’ the law, in effect, says that I cannot listen to the song or read the document without implicating the copyright owner’s access right.”

¹²³ See the discussion in Chapter 6 Part III.

restrictive commercial terms.¹²⁴ The qualification as an exercise of freedom by personal property copy owners provides a legal tool that positively anchors copy owners' rights through property law, with its inherent mediating balancing act to respond to the (unintended) expansion of copyright, either through the effect of TPMs, contracts, or recent legislative reform.¹²⁵ It relies on the fact that these ownership freedoms have long been considered as reasonable exercises of copy ownership open-ended powers and privileges and, as I argued in Chapter 6, are justified by the theoretical justifications and overall objectives of copyright law.¹²⁶

In my view, the unlimited powers and privileges of consumers to play, view, listen to, and read copyright works revolve around securing the scope of ownership rights to commercial copies of copyright works. There is no unfettered unlimited right to play, view, listen to, and read copyright works outside copy ownership.¹²⁷ The legal framework that I propose here, i.e., that copy ownership acts as a property-limitation rule on copyright holders' exclusive rights that preserves consumers' open-ended powers and privileges to play, view, listen to, and read the commercial copies of copyright works they own, will secure this freedom only to the extent that there is more certainty about the concepts of what constitutes a sale and what constitutes goods for commercial transactions involving copies of copyright works. I will analyze these two legal concepts with respect to commercial copies of copyright works in Chapter 8.¹²⁸

To the extent that commercial offerings of copyright works may include fewer sales of copies and move towards other legal transactions (e.g., rental and services), the open-ended powers and privileges to play, view, listen to, and read copyright works with no duty to account to copyright holders will consequently shrink. This is a different matter than the current discussion on the proper allocation of powers and privileges between the competing property rights of copyright holders and of

¹²⁴ See the discussion in Chapter 3 Part III B and C on TPMs and non-negotiated standard end-user agreements of copies of copyright works distributed online.

¹²⁵ Either through the uncertainties brought on by recent legislative reform including the recent addition of TPMs (see the discussion in Chapter 3 Part III B) or by the commercial transactions through which copyright holders make copies of their works available to consumers (see the discussion in Chapter 3 Part III C).

¹²⁶ See the discussion in Chapter 6 Part III.

¹²⁷ I.e., in cases where consumers access copyright works without the transfer of ownership in a commercial copy, i.e. through a service, a loan from the library or by browsing a copy of a work that is available on the internet, the access is either limited in duration, instances of access or, as in the case of a work available online, so long as it remains on the Internet or if it is downloaded or copied by the user, under terms of use that either forbid such acts or are otherwise restricted or are unclear.

copy owners. The multiplication of commercial offerings requires an understanding of the nature of the legal transaction through which copyright works are accessed and the nature of consumers' rights and remedies that result therefrom. It may or may not involve property rights for consumers and includes an examination of consumers' reasonable expectations with respect to the transaction through which they access copyright works. I address these questions by looking at the interaction between property, copyright, contract, and consumer law and theory in the Third Part of my thesis.¹²⁹

I have proposed in this part a legal analysis of three instances in which copy ownership acts as a property-limitation rule of copyright: when the scope of copyright is unclear, as a mean to understand the scope and application of the exhaustion or first sale doctrine, and to secure copy owners open-ended powers and privileges to play, view, listen to, or read the commercial copies of copyright works they own. I will now apply the concept of property-limitation rules in a normative analysis of copy owners' rights to commercial copies of copyright works.

B. The normative force of copy ownership as a property-limitation rule of copyright

In addition to the legal effects of copy ownership acting as a property-limitation rule on the exclusive rights of copyright holders on their work, it also has powerful normative value. As the various forms of uses that consumers can make of digital copies of copyright works are increasing, it challenges the traditional legal framework of the exclusive rights of copyright holders by asking whether or how we need to accommodate these incessantly evolving uses for copy owners. As I discussed in Chapter 6, many of the *prima facie* open-ended privileges and powers of copy owners are countered by explicit ownership rights of copyright holders that unequivocally limit the scope of copy ownership.¹³⁰

Commentators have looked at the normative value of copy ownership to consider the appropriateness of current copyright laws when dealing with an increasingly digitalized environment.¹³¹ For instance, Aaron Perzanowski and Jason Schultz advocate the need to rehabilitate copy ownership through a broader understanding of the exhaustion or first sale doctrine, beyond the right to transfer the

¹²⁸ See the discussion in Chapter 8, in particular Part II and Part IV.

¹²⁹ I.e. "The Application of Consumer Law and Theory to Commercial Copies of Copyright Works" (Chapter 8 to Chapter 11).

¹³⁰ See the discussion in Chapter 6 Part II.

¹³¹ Liu, *supra* note 18; Dusollier 2007, *supra* note 35 at 377-418; Perzanowski & Schultz, *supra* note 49.

ownership of a lawfully acquired copy.¹³² The expanded exhaustion doctrine would encompass many acts that are implicit in the ownership of copies, but the status of which is either not authorized or unclear under current copyright law. The authors analyse earlier copyright common law cases that permitted certain acts for copy owners¹³³ and how this earlier jurisprudence can provide solutions that can be adapted to the digital environment.¹³⁴ Such acts include the ability to transfer digital media, to modify digital media for device-shifting, and to make copies for time- and space-shifting purposes.¹³⁵

Looking at the normative implications of copy ownership is valuable in any attempt to redesign copyright as a private property right in keeping with its underlying objectives of incenting creativity, innovation, and the dissemination of copyright works. It is also critical to address the fate of digital copies.¹³⁶ At an instrumental level, affirming broader ownership rights to copies of copyright works may also create an additional incentive toward lawful copy ownership and lessen the appeal of pirated copies. This would engender a more credible and robust copyright system.

To view copy ownership as a property-limitation rule of copyright provides a valuable framework on which to adequately qualify and address the increased capabilities of consumers' use of copyright works. By the conjecture of new technologies, the *prima facie* open-ended privileges, powers, and self-seekingness inherent to copy ownership are effectively expanding, both physically and in the minds of consumers. This is one possible application of the adaptability of the property institution, in the present case, as it pertains to copyright and to chattels (whether physically exchangeable from hand-to-hand or not).¹³⁷ Property law and theory provide a normative and legal force that cannot be ignored and that can solve the consumer-copyright holder conundrum of rights to commercial copies of copyright works. It can succeed where the *CCA*, in its current structure and design, no longer can.

The purpose of the property-limitation rule analysis undertaken here is not to list all instances of copy ownership uses that need to be recognized to be within the ownership rights of the copy owner of a

¹³² Perzanowski & Schultz, *supra* note 49.

¹³³ Perzanowski & Schultz, *supra* note 49 at 912ff. Those acts are: repair and renewal, adaptation and modification and display and performance.

¹³⁴ *Ibid* at 935ff.

¹³⁵ *Ibid* at 938ff.

¹³⁶ Indeed, most uses of digital works involve a reproduction at some point which is an exclusive ownership right of the copyright holder and an infringement of copyright unless it falls under one of the exceptions to copyright infringement.

¹³⁷ I discuss the physical attributes and legal treatment of digital copies of copyright works in Chapter 8.

copyright work. Rather, it offers a normative analytical framework based on the principles of property law and theory discussed so far to substantiate when and how copy ownership should limit the exclusive rights of copyright owners. Two parameters need to be considered when asserting the ownership rights in the copy of the copyright work. The first is to recognize the need to assert a space for the *prima facie* open-ended freedoms and self-seekingness that are inherent in the ownership of copies of copyright works, and supported by the instrumental justifications to incent creation and the dissemination of works.¹³⁸ The second parameter is that such ownership freedoms cannot extend as far as to harm the ownership rights of copyright holders. The fact that the harmful exercise to the copyright holder comes second is significant in that, just as in traditional property law and theory, the qualification of harm depends in part on the recognition of the competing property freedoms; this was well illustrated in *Victoria Park*.¹³⁹ The application of these two parameters engenders mediation between two competing ownership rights. This balancing act brings copyright closer to other traditional tangible property and counters a decried expansive view of copyright exclusionary powers as encapsulating more positive externalities that derive from the copyright work than they should.¹⁴⁰

With respect to the first parameter, the consumer-owners' open-ended uses and privileges should not extend beyond their underlying justifications, i.e., the *prima facie* normative status of all ownership freedoms, the instrumental promotion of creative and innovative citizens benefiting from their access, communication, and network environment, as well as the need to preserve and protect their autonomy and freedom in how they experience copyright works.¹⁴¹ Any use that is not supported by at least one of these underlying justifications would not fall *a priori* within the open-ended privileges and uses of an owner of the copy of a copyright work. To the extent that certain uses or privileges are justified by their underlying property-specific justice reason, then such uses or privileges would give rise to trespassory rules.¹⁴² As consumers' uses shift from the private, personal sphere to the commercial

¹³⁸ See the argument that I develop in Chapter 6 Part III A and B regarding the theoretical justifications of ownership of copies of copyright works.

¹³⁹ *Supra* note 20. In particular, the fact that the reasonable exercise of the ownership rights of the defendant (adjacent owner of the plaintiff race track owner) included taking advantage of positive externalities of the plaintiff race track property, so long as the plaintiff did not lose the enjoyment of his property. To say the contrary would have deprived the defendant of the reasonable enjoyment of his own property.

¹⁴⁰ See Lemley, *supra* note 23 at 1033,1044.

¹⁴¹ See the discussion on the justifications of copies of copyright works in Chapter 6 Part III A and B.

¹⁴² For instance, this could apply to TPMs that impeach the consumer to make copies of a music CD (assuming such use is asserted as being within the open-ended uses supported by the ownership rights in the CD). The corollary is that the consumer would be entitled to legal remedies against this technological measure.

sphere, the underlying property-specific justice reason for their ownership rights in copies of copyright works is altered.¹⁴³ The shift of property-specific justice reasons, when moving from personal to commercial uses, that would directly compete with the copyright holders' economic rights, provide insights into when and why the open-ended uses and privileges in copies of copyright works may no longer be justified and should be altered.¹⁴⁴ The shift also resonates with the internal limits set by an instrumental view of copyright as a tool to incent creation and the dissemination of works,¹⁴⁵ although, until recently, the *CCA* made little distinction between commercial and non-commercial uses for the purpose of copyright infringement.¹⁴⁶ With its recent amendments, the *CCA* relies increasingly on that distinction,¹⁴⁷ although copyright infringement is still determined for the greater part on the basis of an act as opposed to a purpose basis.¹⁴⁸ The shift from personal to commercial uses also brings different property-limitation rules and independent-property prohibitions.¹⁴⁹ Finally, any uses or privileges that the property institution cannot support either at a conceptual or practical level should not fall within the property domain of the lawful owner of the copy of a copyright work.

With respect to the second parameter, any exercise of the *prima facie* open-ended freedoms associated with the ownership rights in commercial copies of copyright works that would harm the ownership

¹⁴³One of the reasons being that the commercial sphere involves different distributive consequences: see Harris, *supra* note 16, at 275, where the author [citing John Christman, *The Myth of Property* (OUP, 1994), pt. 3] refers to two distinct concepts within ownership, i.e. "control ownership" and "income ownership": "the first would encompass use-privileges and all unilateral exercises of powers (including gifts) and the latter all exercises of power made for consideration (hire, rent, sale, or exchange)" the reason being "that the former can be justified by autonomy considerations whereas the latter has distributional consequences."

¹⁴⁴For instance, the use of a copyright work as part of a commercial activity could give rise to either property remedies, such as injunctive relief and damages or a liability rule, such as a compulsory license.

¹⁴⁵See Litman 2007, *supra* note 121 at 1911-1911 who proposes in a US context a model of four categories of personal uses that should be considered in establishing personal use rights of copyright works, whereby the personal uses are measured against their likely effect on "copyright liberties" and on the incentive to create of the copyright holder.

¹⁴⁶I discuss the non-commercial v. commercial purpose distinction in Chapter 2 Part IV.

¹⁴⁷I discuss the recent amendments to the *CCA*, *supra* note 4 and the four new user provisions in Chapter 3 Part II D.

¹⁴⁸I discuss the non-commercial v. Commercial purpose distinction in Chapter 2 Part IV.

¹⁴⁹For example, the property of a laser printer supports certain open-ended personal uses and privileges that change once the use of the laser printer is made for commercial purposes. Other independent property-limitation rules may start to apply, such as safety in the workplace rules, quality standard rules for consumer usage and so on. The same can be said of the copy of a copyright work. Once the use shifts from a private, non-commercial use to a public or commercial use, different property-limitation and property-independent rules would apply, including those limitations that are based on the copyright holder's exclusive rights, as reframed by the limitations imposed by the consumers' ownership rights in copies of copyright works.

rights of copyright holders would not be authorized, as it would be unjust that ownership rights be exercised in a way that harms the ownership rights of others, including of copyright holders.¹⁵⁰ In such a case, the consumer owning the copy of the copyright work would act outside the property-specific justice reasons that support her ownership rights.

Putting forward the normative force of consumers' ownership freedoms as supported by instrumental justifications¹⁵¹ forces us to revisit the scope of exclusive rights of copyright holders. If uses fall within the realm of what copy owners should be *a priori* able to do with the copy in their personal sphere, then the onus should be on copyright holders to prove that a certain act caused economic or moral harm. By the same token, the assumptions around what causes economic harm would need to give way to the competing ownership rights of copy owners. To be sure, acts that currently fall under the exclusive domain of copyright holders (reproduction, telecommunication to the public, performance in public) when performed by a copy owner, would not necessarily fall within the domain of copyright holders, unless they could prove that copyright holders suffered economic or moral harm.

Under the current wording of the *CCA*, any act of reproduction and any performance in public that the consumer makes of or with the copy of the copyright work is an infringement of copyright unless it falls under one of the specific stated exceptions, or unless it has been specifically authorized by copyright holders.¹⁵² However, such acts do not necessarily cause harm to the copyright holder's exclusive rights,¹⁵³ although they may still give rise to statutory damages under the *CCA*.¹⁵⁴

¹⁵⁰ Through the application of Harris's theory around "property-limitation rules" the exercise of prima facie open-ended privileges and powers are limited when such exercise is harmful to others, Harris *supra* note 16 at 35. See also Part II and III of this chapter.

¹⁵¹ I.e., the first parameter that I reviewed above in Part III B of this chapter.

¹⁵² *CCA*, *supra* note 4, ss 27-27.1. See also the discussion on exceptions to copyright infringement in Chapter 3, in particular Part II.

¹⁵³ On this matter see for example Lisa N. Takeyama, "Piracy, Asymmetric Information and Product Quality" in Wendy J. Gordon & Richard Watt, eds, *The Economics of Copyright* (Cheltenham, UK: Edward Elgar, 2003) at 62, where the author analyses the actual economic harm of copying on copyright holders. She concludes, inter alia, that "the information value from copying can improve social welfare over that without copying where there is asymmetric information about product quality. In some cases, the presence of copying can induce a Pareto improvement in social welfare, as it has the potential to solve the result adverse selection problem." The author also concludes that standard measures of harm from copying may be largely overstated, since they do not account for the possibility that copiers subsequently purchase the work": *ibid.* See also Stan Liebowitz, "Back to the Future: Can copyright Owners Appropriate Revenues in the Face of New Copying Technologies?" in Wendy J. Gordon & Richard Watt, eds, *The Economics of Copyright* (Cheltenham, UK: Edward Elgar, 2003) at 1-25. See also Liu, *supra* note 18 at 1282.

Reframing copyright infringement (i.e., copyright holders' exclusionary powers) by first recognizing the *prima facie* normative force of copy ownership and around the notion of economic or moral harm inflicted on the ownership rights of copyright holders, as opposed to around acts of production, reproduction, and performances in public is one suggestion among other valuable approaches.¹⁵⁵ True to the property-specific justice reason of copyright at the stage of commercialization of copyright works, harm to copyright holders needs to aim more specifically at dealings with the copyright works that undermine the incentive for the creation and dissemination of copyright works.

To frame the ownership in copies of copyright works positively as a property-limitation rule of copyright is to refuse the *status quo* (and to passively accept one of the starting premises of my thesis) i.e. that the ownership rights in commercial copies of copyright works have been and continue to be defined consequentially and by default to the ownership rights of copyright holders in their works. From a property theory perspective, maintaining the status quo is the equivalent of automatically making the ownership rights in property A subject to how the ownership rights in property B are and will be defined in the future, therefore discriminating for copyright holders and against copy owners, by preferring the former over the latter. This approach fails to recognize the reality of two different but equally meritorious, in their own right, competing property claims that need to be mediated one against the other.¹⁵⁶ Depending on the issue to be resolved, emphasis will be placed on the limiting effects of copyright or on the limiting effects of the ownership rights in the copy of the copyright work.

¹⁵⁴ As per *CCA*, *supra*, note 4, s 38.1, it is possible for a copyright holder to claim a fixed dollar amount per instance of copyright infringement without having to prove actual damages. However, the ability to claim statutory damages for infringement that arises from uses for non-commercial purposes is limited under this provision.

¹⁵⁵ Litman 2001, *supra* note 120 at Chapter 12, whereby the author recommends to reframe the exclusive rights conferred by copyright as an exclusive dissemination right for commercial exploitation; Daniel Gervais, "Towards a new core international copyright norm: the reverse three-step test" (2005) 9 Marq. Intell. Prop. L. Rev. 1. The author proposes a restructuration of copyright holders' exclusive rights by combining the fair use doctrine with the "three-step test" found under the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 29, 33 I.L.M. 1197 (1994) [*TRIPS*], to become the definition of copyright holders' rights and not the exceptions. In other words, everything that is not permitted by fair use and the Three-Step test should be within the exclusive rights of copyright holders. See the discussion in Chapter 12 Part IV.

¹⁵⁶ On this point, see Dusollier 2007, *supra* note 35 at 379 who points to the absence of hierarchy between the competing property rights of copyright holders and of copy owner with respect to the same object, the work.

The discrimination between two competing property owners or double standard by which prominence is given to the property rights of copyright holders at the expense of the property rights of copy owners is intensifying in the digital age. As Julie Cohen notes:

the legal regime being created in digital space is not “simply” a regime based on property rights designed to mimic the behavior of property rights in real space. Instead, we are constructing a legal regime in which notions of boundedness are applied unevenly and unequally. In a legal culture that believes in taking property seriously, resolving the tension between owners’ and users’ rights in things requires consideration of users’ countervailing rights in some less expedient manner than simply defining them away.¹⁵⁷

Cohen voices concerns similar to the ones that I raise, throughout this chapter and elsewhere, on the poorly substantiated rationale behind the progressive effacement of ownership rights in copies of copyright works as personal property for the sake of another form of property, i.e., copyright.

The ownership in the copy of a copyright work is one among many other property-limitation rules to copyright. The use of a copyright work (other than as owner of a copy) under one of the stated purposes of fair dealing, under the public policy exception,¹⁵⁸ under the visual disability rules, or even under competition law, are other distinct manifestations of property-limitation rules to copyright. For David Vaver, such “exceptions” or “users’ rights” set the outer limits of copyright: “owners cannot control acts falling under the exceptions because their rights do not extend that far.”¹⁵⁹ Under a property-limitation rules’ analysis, copyright holders’ rights would normally restrict the relevant act, but for the exception or limitation that copyright law imposes. Hanoch Dagan refers to the limitation of fair use in copyright law as a “right of entry.”¹⁶⁰

In contrast with these property-limitation rules, when consumers buy commercial copies of copyright works, they acquire property rights in the copies that set the consumers apart from other relationships between copyright holders and other users. From the copyright holders’ perspective, this transaction with consumers-purchasers alters the *prima facie* open-ended privileges and powers as private copyright owners *with these* particular consumers, to make way to their status as copy owners.

¹⁵⁷ Julie Cohen, “Overcoming Property: Does Copyright Trump Privacy?” (2002) U. Ill. J.L. Tech. & Pol’y 375 at 381.

¹⁵⁸ Public policy grounds can operate as a specific property-limitation rule of copyright in some cases. For a recent discussion of this limitation to the exclusive rights of copyright holders see: Alexandra Sims, “The denial of copyright protection on public policy grounds” (2008) 30 E.I.P.R. 189.

¹⁵⁹ David Vaver, *Copyright Law* (Toronto: Irwin Law Inc., 2000) at 170.

In this part of the present chapter, I discussed the legal and normative value of copy ownership as a property-limitation rule of copyright and how copy ownership needs to be considered at par with copyright holders' exclusive rights in their work. Defining and ascertaining copyright consumers' rights begins with understanding the ownership rights in commercial copies of copyright works as an anchor to understand vehicles other than ownership to access copyright works. The next step is to look at the extent to which the contractual relationship modulates the competing property rights of copyright holders and copy owners.

IV. Mediating between copyright, copy ownership, and contract through the standardization of property

The *numerus clausus* principle by which there is a fixed and closed list of property rights recognized by law and, as one corollary, limitations on how owners can alter the nature of their property rights, is particularly relevant to the personal property rights of purchasers of copies of copyright works, as such rights may from time to time be altered by contract.¹⁶¹ I have discussed in Chapter 4, the debate about the *numerus clausus* principle's existence and justification in the common law tradition of property,¹⁶² and in Chapter 5 and Chapter 6, about the insights that the *numerus clausus* principle brings to the understanding of the distinct nature of copyright and of copies of copyright works..¹⁶³ The survey that Thomas Merrill and Henry Smith conducted on the common law of property led them to conclude that there were even fewer forms of property available for personal property than for real property.¹⁶⁴ In other words, there is a greater level of standardization in the realm of personal property than with respect to real property. Its benefit and, as Merrill and Smith argue, its justification, is to constrain information processing costs – in the present case – of all personal property owners of similar copies of copyright works and, at a broader level, of all personal property owners in a given jurisdiction.¹⁶⁵

¹⁶⁰ Hanoch Dagan, *Property Values and Institutions* (Oxford: Oxford University Press, 2011) at 50.

¹⁶¹ See the discussion on the *numerus clausus* principle in Chapter 4 Part III.

¹⁶² *Ibid.*

¹⁶³ See the discussion in Chapter 5 Part IV C and Chapter 6 Part II C.

¹⁶⁴ Thomas W. Merrill & Henry E. Smith, "Optimal Standardization in the Law of Property: the Numerus clausus Principle" (2000) 110 Yale L.J. 1 at 17-18.

¹⁶⁵ *Ibid.* See the discussion on the standardization of property in Chapter 4 Part III.

In effect, the *numerus clausus* principle as a “norm of judicial self-governance”¹⁶⁶ is a tool to equip the judiciary to maintain essential attributes of the ownership of personal property copy owners when copyright holders seek to strip it of its essential attributes, including the *prima facie* open-ended power and privilege to authorize transfer in the copy. In the context of copyright, it is one way to qualify copyright holders’ freedom of contract to balance copyright holders’ interests against the competing interests of copy owners. It constrains copyright holders’ possible inclination to expand their property rights at the expense of personal property copy owners. It mediates between competing property rights and the effect that contracts can have on those rights.

In the discussion on the exhaustion or first sale doctrine and its exemplification of copy ownership acting as a property-limitation rule to constrain the scope of copyright, I raised concerns around the well-documented circumvention of this legal principle by copyright holders through contract.¹⁶⁷ Through this commercial practice, copyright holders effectively created a species of personal property that is devoid of one of its core attributes, the *prima facie* open-ended freedom and power of alienation. Courts in the US have given different weight to the characterization of the contract as a licence and have at times tended to look to the substance of the transaction to determine whether a sale or licence of the commercial copy of the copyright work took place rather than to rely on how it was designated in the contract.¹⁶⁸ In *Vernor v. Autodesk*, [*Autodesk*],¹⁶⁹ the US Court of Appeals,

¹⁶⁶ *Ibid* at 11.

¹⁶⁷ I refer here more particularly to the terms of the licence agreement that restrict the right to transfer the copy of the copyright work and not other terms necessary to allow the use of the copy, e.g. the right to reproduce the work including to make backup copies, etc... The newly introduced distribution right in the CCA increases copyright holders’ powers to subject the distribution of copies of their works to additional restrictions that will be opposable to all. See the discussion in Chapter 3 Part II F and in Part III A (ii) of this chapter.

¹⁶⁸ In a the recent judgment by the U.S. Court of Appeals, Ninth Circuit, *Vernor v Autodesk, Inc.*, F.3d 2010 WL 3516435 (9th Cir. 2010) the Court reviewed previous judgments by the same Court on the factors that should be considered to determine whether a sale or a licence of copies of computer programs had taken place, giving particular weight to copyright holders’ restrictions on the ability to transfer copies to other parties to determine that no sale had taken place. The reasoning applied by the U.S. District Court of California in: *Softman Products Company, LLC, v Adobe Systems Inc.*, 171 F.Supp.2d 1075, 45 UCC Rep.Serv.2d 945 (C.D. Cal. 2001) at para 14, is one illustration of how courts have qualified the transaction, regardless of suppliers labelling the contract as a licence: “the following factors require a finding that distributing software under licenses transfers individual copy ownership: temporally unlimited possession, absence of time limits on copy possession, pricing and payment schemes that are unitary not serial, licenses under which subsequent transfer is neither prohibited nor conditioned on obtaining the licensor’s prior approval (only subject to a prohibition against rental and a requirement that any transfer be of the entity), and licenses under which the use restrictions’ principal purpose is to protect intangible copyrightable subject matter, and not to preserve property interests in individual program copies”. The court relied on the comments made by Professor Nimmer: “Ownership of a copy should be determined based on the actual

Ninth Circuit, enunciated three considerations that courts may use to determine whether a licence or a sale of the copy of a copyright work took place, giving particular weight to the designation in the contract as a licence, as well as to terms restricting the right to transfer copies of copyright works.¹⁷⁰ The guidance factors enunciated in *Autodesk* have been applied in subsequent judgments by the same Court and lower US courts.¹⁷¹ As I will discuss in Chapter 8, the Court of Justice in the EU took a different approach in *UsedSoft*, looking to the substance of the transaction to determine that the sale of copies of computer programs had taken place, regardless of contract terms stating that the copy of the computer program was licensed.¹⁷²

The resistance by some courts to enforce contract terms that restrict the alienability of copies of copyright works lawfully purchased may be explained through the application of the *numerus clausus* principle, even though the courts do not specifically refer to that principle.¹⁷³ Viewed through the lens of the *numerus clausus* principle, these cases bring other important insights on the relationship between the *standardization* within property and the justifications for the exhaustion or first sale

character, rather than the label, of the transaction by which the user obtained possession. Merely labelling a transaction as a lease or license does not control. If a transaction involves a single payment giving the buyer an unlimited period in which it has a right to possession, the transaction is a sale. In this situation, the buyer owns the copy regardless of the label the parties use for the contract. Course of dealing and trade usage may be relevant, since they establish the expectations and intent of the parties. The pertinent issue is whether, as in a lease, the user may be required to return the copy to the vendor after the expiration of a particular period. If not, the transaction conveyed not only possession, but also transferred ownership of the copy". See also Michael Seringhaus, "E-Book Transactions: Amazon "Kindles" The Copy Ownership Debate" (2009) 12 Yale J. L. & Tech. 147 at 161ff.

¹⁶⁹ *Supra* note 168.

¹⁷⁰ *Ibid.* The Court held, at 8 that based on earlier judgments by the same Court there were three considerations that the court may consider to determine whether "a software user is a licensee, rather than an owner of a copy. [...] a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions." Petition for writ of certiorari was denied by the US Supreme Court: *Vernor v Autodesk, Inc.*, 132 S.Ct. 105 (2011).

¹⁷¹ *MDY Industries, LLC v Blizzard Entertainment, Inc.*, 629 F.3d 928 (9th Cir 2010); *Apple Inc. v Pystar Corporation*, 658 F.3d 1150 (9th Cir, 2011); *Adobe Systems Incorporated, v Hoops Enterprise*, 2012 WL 1710951 (ND Cal.), in which the Courts applied *Autodesk*, *supra* note 166, and found that the software user was a licensee. In *UMG Recordings Inc. v Augusto*, 628 F.3d 1175 (9th Cir 2011) the Court found that transfer of ownership of the copy of promotional music CDs to the user had taken place.

¹⁷² See the discussion in Chapter 8 Part III. See also Dusollier 2007, *supra* note 35 at 405, 413, where the author notes how licences to commercial copies are often sales in the commercial copies regardless of their designation as licences. In such cases, clauses restraining the alienability of the physical object embodying copyright works of no force and effect. The transmission of a physical object, the payment of a one-time fee and the absence of a limitation of term on the possession of the object are factors that would indicate a sale: *ibid.*

¹⁷³ *Ibid.* For example, this was the case in *UsedSoft*, *supra* note 79 and in *Softman Products Company, LLC, v Adobe Systems Inc.*, *supra* note 168. See also *United States v Wise*, 550 F.2d 1180 (9th Cir.1977) at 1192.

doctrine. The most common explanation of its origin, the English common law rule against restraints on alienation of property,¹⁷⁴ can be viewed as an application of the *numerus clausus* principle. The right to transfer property is one of the fundamental open-ended powers and privileges attached to ownership. The prohibition against alienation of property is the expression of a reticence to alter a form a property in such a significant way. The exhaustion or first sale doctrine can also be explained by the need to limit the existing forms of property or the *numerus clausus* principle.

While it is a tenet of copyright law to grant extensive freedom to copyright holders to decide how, when, and to whom they authorize the exploitation of their exclusive rights, the standardization of property can be the justification not to enforce contracts that create another form of property, including in cases where the main purpose is to circumvent the exhaustion or first sale doctrine. To reach another conclusion leads to a dislocated and incoherent application of the nature and scope of copyright, of the scope of the prerogative of freedom of contract that comes with it, and of the nature and powers of property.

The existence of the *numerus clausus* principle and its application to copies of copyright works to preserve the integrity of ownership in the copies is debatable. This includes applying the first sale doctrine by constraining licence terms that forbid the subsequent transfer of copies of copyright works. Glen O. Robinson defends the existence of various contractual limitations, including the limitation on the right to transfer copies of software in licence agreements.¹⁷⁵ He equates such limitations to a form of property servitude.¹⁷⁶ Robinson finds no convincing ground for the traditional reluctance by courts to enforce personal property servitudes, including restrictions of use and transfer of software copies in licence agreements. The instances where such use and transfer restrictions could be restrained by courts would be the exception rather than the rule: they would possibly include cases where such use restrictions preclude a fair use by copy users.¹⁷⁷ He rejects the argument that personal property servitudes restraining the right to transfer software copies should be held unenforceable on the basis of the first sale doctrine and of its presumed underlying justification for prohibiting restraints to the alienation of property, two arguments that he finds unconvincing.¹⁷⁸ For Robinson, the public policy grounds for the first sale doctrine are not clear and are likely not at the same level of

¹⁷⁴ See the discussion in Part III A (ii) of this chapter.

¹⁷⁵ Glen O. Robinson, "Personal Property Servitudes" (2004) 71 U. Chi. L. Rev. 1449.

¹⁷⁶ *Ibid.* at 1449.

¹⁷⁷ *Ibid.* at 1509ff.

¹⁷⁸ *Ibid.*, at 1470ff.

importance as the doctrine of fair use and it is debatable that it should be a ground to invalidate clauses that restrict the transfer of the copy of a software.¹⁷⁹ Robinson doubts the existence and justification of the *numerus clausus* principle in the common law tradition of property, both legally and normatively.¹⁸⁰ For him, the notification of terms can in fact reduce information costs without the standardization of property.¹⁸¹ In the case of restrictive terms in software licence agreements, their prevalence also changes users' expectations and become the norm, which addresses any initial issue of information transaction costs.¹⁸²

It is not surprising that Robinson questions the existence of the *numerus clausus* principle, as well as the merit of the first sale doctrine. The exhaustion or first sale doctrine can be justified by the standardization of property as they share common concerns about maintaining the integrity of rights conferred by ownership of property by limiting the forms of property interests. The acceptance or rejection of the *numerus clausus* principle reflects important diverging views on the nature of property and on its specificity.¹⁸³ For Robinson, property and contracts are two forms of private ordering and, on that basis, he questions why courts should give precedence to the former over the latter by refusing to enforce contract clauses that go against, *inter alia*, the standardization of property.¹⁸⁴

The argument that freedom of contract should be encouraged on an equal footing with property as a form of private ordering is of little application in the context of non-negotiated consumer agreements where freedom of contract is very limited. The assumption that freedom of contract is necessary to address the individual needs of the consumers and other users cannot readily be made. As a result, the competing property rights of consumers and other users tend to be trivialized.¹⁸⁵ Likewise, the broader balancing act of competing interests that withstand the property grant in copyright is easily trumped by the terms of the contract set by suppliers.¹⁸⁶ It is so unless one is willing to concede that in some specific cases the substance of the property right in question should take precedence over the terms of contract to maintain coherence and hence efficiency within property law and within copyright law.

¹⁷⁹ Robinson, *supra* note 175 at 1479.

¹⁸⁰ *Ibid* at 1482ff. See the discussion on the debate on the existence and justifications of the *numerus clausus* principle in property in Chapter 4 Part III.

¹⁸¹ *Ibid*, at 1487.

¹⁸² *Ibid* at 1490-1491.

¹⁸³ See the discussion on the standardization of property in Chapter 4 Part III.

¹⁸⁴ Robinson, *supra* note 175 at 1477-1478.

¹⁸⁵ See the discussion of standard non-negotiated end-user agreements of commercial copies purchased online in Chapter 3 Part III C.

¹⁸⁶ *Ibid*.

Another criticism of the application of the *numerous clausus* principle to consumer contracts of copies of copyright works is that it may deprive copyright holders and consumers of the advantages of price differentiation, for example, based on the ability to transfer, or not transfer, copies of copyright works.¹⁸⁷ In response to this criticism, regarding the personal property portion of the commercial transaction (as opposed to the intangible right to make uses otherwise restricted by copyright), copyright holders remain free to utilize all legal vehicles that are well recognized in property law and generally known to consumers: sale, lease, rental, as well as outside property law, for instance, by offering a service,¹⁸⁸ in the place of a licence having all the attributes of the sale of the copy, except for the right to transfer ownership in the copy or other restriction substantially depriving consumers of their ownership rights in the copy. It is with respect to this specific portion of the transaction that the *numerus clausus* principle would limit any attempt to create new species of property rights.

The notification effects that the known form of property right exerts on consumers are a key element. The restriction on transfer of the copy in a transaction that has all the attributes of a sale in the copy would typically not be advertised to allow consumers to make a trade-off in exchange for a more advantageous price.¹⁸⁹ It is more likely that the right to transfer the commercial copy of the copyright work purchased online would be buried in the non-negotiated standard end-user agreements that are increasingly part of the online distribution of copies of copyright works.¹⁹⁰ Also, a consumer protection analysis informs us that certain rights, such as the freedom to alienate a chattel, can simply not be sold except as specifically contemplated by specific forms of known agreements such as rentals.¹⁹¹ Last, freedom of contract is no longer an absolute concept in relation to consumer transactions; consumer contract terms are subject to various consumer protection mechanisms that have developed over the years.¹⁹²

¹⁸⁷ Jean Braucher, "Contracting Out of Article 2 Using a "License" Label: a Strategy that Should not Work for Software Products" (2007) 40 Loy. L.A. L. Rev. 261 at 272 proposes that there should be specific rules of digital exhaustion that dictate when restrictions on copy transfers should be enforced and when not. She bases her arguments on the merits of price differentiation in the market place: *ibid*.

¹⁸⁸ For example, streaming services with no possibility to download or copy would fall in that category.

¹⁸⁹ See the discussion on standard non-negotiated end-user agreements for the purchase of commercial copies of copyright works online in Chapter 3 Part III C.

¹⁹⁰ *Ibid*.

¹⁹¹ See Chapter 9 for the review of the relevant consumer law principles and Chapter 11 for the application of consumer law to various scenarios involving copies of copyright works.

¹⁹² *Ibid*.

I have argued in this Part that the *numerus clausus* principle, as a “norm of judicial self-governance,”¹⁹³ can provide guidance to courts to limit any expansion of copyright that interferes with copy ownership by creating another form of property interest.¹⁹⁴ It provides a legal framework to secure the scope of consumers’ ownership rights to copies of copyright works. Other mechanisms can achieve similar results by constraining copyright holders’ property rights and the contract terms that govern their commercial exploitation. They include statutory provisions giving no force and effect to contract terms for the commercialization of copies of copyright works that deviate materially from the objectives of the property rights conferred to copyright holders by copyright law.¹⁹⁵

V. Conclusion

In this chapter, I looked at the interaction of copy ownership and copyright through the lens of property-limitation rules. I demonstrated how their application offers legal solutions as well as a normative framework to address areas of uncertainty or of discontent as to how the competing property rights of copy owners and of copyright holders are presently mediated.

When consumers lawfully acquire the copy of a copyright work, two property rights are always competing. The increasing permutation of “lawful acquisition” by “lawful access through licence” may amplify this tension rather than alleviate it. It leaves behind the justice and efficiency benefits of well-established and flexible concepts of personal property. Should copyright digital distribution evolve toward a complete eradication of copy ownership in digital copyright works, the fundamental interests of copyright consumers discussed in this chapter and in the Second Part of my thesis¹⁹⁶ remain highly relevant and applicable, and still need to be addressed. Depending on how they are incorporated into the copyright design, they may still act as property-limitation rules on copyright.

¹⁹³ Merrill & Smith, *supra* note 164 at 11.

¹⁹⁴ E.g., through the commercial practice of transferring possession in commercial copies of copyright work for an indefinite duration but to limit the right to transfer the copy to another party to avoid the application of the exhaustion or first sale doctrine.

¹⁹⁵ This legal mechanism is broader in its application than the *numerus clausus* principle and can extend to contract terms that are contrary to exceptions to copyright infringement or to contracts that do not involve the transfer of ownership in copies of copyright works. See the discussion in Chapter 3 Part III A and Chapter 12 Part III E.

¹⁹⁶ Second Part: The Application of Property Law and Theory to Copyright and Commercial Copies of Copyright Works (Chapter 4 to Chapter 7).

The potential “property conflict” or “lawful access conflict” between consumers and copyright holders is a specific, yet very widespread manifestation within the broader copyright access spectrum and public domain debate. As I demonstrated throughout this chapter and the Second Part of my thesis, property and copyright law and theory help to explain the nature of this specific legal relationship at play more incisively than simply opposing broad public policy considerations against the ownership rights of copyright holders. As Waldron observed:

if broad public policy arguments are the only counter balance to the private property of the copyright holder, we may be leaving out of the picture those who are directly and immediately affected by the enforcement of the property rule, “those to whom, above all, a justification of property is owed.”¹⁹⁷

The broader policy objectives are important considerations to define the scope of copyright and copy ownership respectively, within the framework and solutions offered by the property institution.

Throughout the Second Part of my thesis, I have defined the nature of copy ownership and copyright as distinct forms of property rights, looked at how they compete, and offered a theoretical framework to help mediate between these two competing rights with particular attention to copy ownership. This is the first step in substantiating copy owners’ rights in commercial copies of copyright works. Building on the property law and theory analysis to copy ownership and copyright that I presented here, the next task is to understand the extent to which consumer law and theory can further strengthen consumers’ rights to copies of copyright works and offer another perspective on the intricate dynamics at play.

¹⁹⁷ Waldron, *supra* note 7 at 117.

Chapter 8

Commercial Copies of Copyright Works: Unfit to be Goods?

I. Introduction

In the Second Part of my thesis (i.e., Chapters 4 to 7) I looked at copyright and copy ownership through property law and theory and at how they can address the disjunctions of copyright consumers rights identified in the First Part of my thesis. In particular, I presented a legal and normative framework that looks at copy ownership and copyright on an equal footing to reverse the trend of a progressive trivialization in copy ownership rights, as copies are increasingly dematerialized through their online distribution and through copyright holders' commercial practices.

In the third part of my thesis, starting with this chapter, I build on the insights of property law and theory and look at how consumer law and theory can further contribute to strengthening copyright consumers' rights to copies of copyright works. I apply consumer law principles and look at how they can counterbalance the copyright-holder-centric framework of copyright law. For instance, does consumer law give consumers the legal tools to fulfill their reasonable expectations on the scope of permitted uses of copies of copyright works, even when those expectations are contrary to what copyright holders authorize? In particular, I look at the extent to which consumer law limits copyright holders' freedom of contract in the area of implied obligations, and the rationale for these constraints.

The effects of consumer law have been described as “*une extension du cercle contractuel*.”¹ The mandatory nature of the consumer protection obligations of particular interest to copies of copyright works,² the rejection of the parol evidence rule,³ the nullity of provisions discarding verbal agreements,⁴ and the potentially binding nature of representations made by suppliers external to the

¹ Which can be translated as: “the extension of the contractual sphere”: Nicole L’Heureux, *Droit de la consommation*, 5^e édition (Cowansville, Que: Yvon Blais, 2000) at 21.

² The specific consumer law obligations that I apply to copies of copyright works are: statutory implied obligations of quality and fitness for purpose, correspondence with description, title, quiet possession and freedom from encumbrances, restrictions and prohibitions of unfair practices, and information disclosure requirements: see Chapter 9. Consumer implied obligations are generally mandatory: *Ibid*.

³ For example, as stated in Québec *Consumer Protection Act*, RSQ, c. P-40.1 [*QCPA*] art 263; Saskatchewan *Consumer Protection Act* of the *Statutes of Saskatchewan, 1996* c C-30.1 [*SCPA*], s 46.

⁴ *QCPA*, *supra* note 3, art 263.

contract⁵ are illustrations of that extended contractual realm. In essence, the contract is one among several other relevant factors to consider when determining the application of consumer-protection-implied obligations.⁶ From that perspective, consumer protection law offers, *a priori*, a credible counterweight to the exclusive property rights of copyright holders and how they are exercised in consumer transactions. From a property theory perspective, I am particularly interested in looking at the extent to which consumer law acts as a property-limitation rule of copyright holders' exclusive rights.⁷

In Canada, the regulation of consumer commercial transactions is a matter of provincial jurisdiction⁸ and is generally found in consumer protection statutes. The provincial consumer laws of relevance to implied obligations⁹ often explicitly build upon the existing sale of goods laws (in the common law provinces and territories)¹⁰ or, in Québec, co-exist with the *Civil Code of Québec* [CCQ].¹¹ Applying these bodies of laws to digital copies of copyright works is at times arduous. It involves statutes of other eras dominated by preoccupations that seem to show little regard to objects such as commercially available digital copies of copyright works.¹² Commentators have noted the

⁵ *QCPA*, *supra* note 3, art 41-43; EC, *Parliament and Council Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees* [1999] OJ L 171/07 at 12 [Directive 1999/44/EC] the object of which is (article 1) the approximation of the laws of the Member States on "certain aspects of the sale of consumer goods and associated guarantees in order to ensure a uniform minimum level of consumer protection in the context of the internal market"; in the UK, the public statements on specific characteristics of goods is one of the relevant factors to consider to assess what constitutes "satisfactory quality": *Sale of Goods Act 1979* (UK), 1979, c. 54 [UKSGA], s 14 2 (d), the *Supply of Goods and Services Act 1982* (UK), 1982, c. 29 [UKSGSA], ss 4 (2)B & 9 (2)B.

⁶ I discuss the application of consumer-implied obligations in Chapter 9.

⁷ James W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996) at 34, i.e.: "when prima facie normative claims founded on the prevailing ownership conception are overridden. They are premised on the notion that but for the limitation they contain, the owner would be free to do as he pleases."

⁸ At least, the consumer protection matters that are related to contracts, which are matters of provincial jurisdictions: *Constitution Act, 1867* (U.K.), 30&31 Vict., c. 3 [1867 Act], ss 92(13), 92(16).

⁹ E.g. implied obligations of quality and fitness for purpose, of title and of quiet possession.

¹⁰ For example, see the Ontario *Consumer Protection Act*, S.O. 2002, c. 30, schedule A, [OCPA] ss 9(2), 9(3). S 9(3) refers to the existing implied obligations of the Ontario *Sale of Goods Act*, R.S.O. 1990, c. S-1, [OSGA] and adds additional protection for consumer agreements: "Any term or acknowledgement, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the *Sale of Goods Act* or any deemed condition or warranty under this Act is void." See also British Columbia *Sale of Goods Act*, R.S.B.C. 1996 c.410, s. 20 [BCSGA].

¹¹ Art 1384 CCQ specifically refers to consumer contracts and defines consumer contracts generally. In some respects, CCQ is broader in its application than *QCPA*, *supra* note 3: see L'Heureux, *supra* note 1 at 35ff.

¹² For instance, see the definition of "goods" in the *OSGA*, *supra* note 10, s 1 (1): "'goods' means all chattels personal, other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under

incongruities and uneasiness of the application of sale of goods and consumer protection laws to copies of copyright works.¹³ Whether copies of copyright works are “goods” is one illustration of such incongruities that I analyze in the present chapter.

While the primary goal here is to resort to consumer law as a means to clarify and substantiate consumers’ rights to copies of copyright works, and not to offer an extensive critique on the merit and effectiveness of the current consumer protection mechanisms in place, this exercise inevitably leads to uncovering some of their shortcomings. Where pertinent, I identify existing gaps and opportunities that lie within the consumer protection obligations as a regulatory tool of consumer transactions of copies of copyright works.

In Part II, I look at how courts assess the nature of copies of copyright works in sale of goods and consumer law by placing an undue emphasis on the presence of physical supporting media exchanged from hand-to-hand. I analyze the jurisprudence that assesses the goods-like nature of copies of copyright works through three dichotomies, i.e., tangible v. intangible, goods v. services, and sale v. licence, and revisit their application for a more coherent qualification of the nature of copies of copyright works. In Part III, I draw parallels between my analysis on the incoherent qualification of

the contract of sale (...); Treatises on sale of goods law and on consumer protection law rarely discuss in much detail the applicability of this body of law to information products, except for the few references to whether computer programs constitute goods or not: See for example Gerald H.L. Fridman, *Sale of Goods in Canada*, 5th ed. (Toronto: Thomson Carswell, 2004) at 47-60, discussion on “good” includes little reference to information products which are commonly referred to as “intangibles”; L’Heureux, *supra* note 1, does not discuss the particularities of goods subject to intellectual property or information products. See also Anthony Gordon Guest, (gen. ed.) *Benjamin’s Sale of Goods*, 7th ed. (London : Sweet & Maxwell, 2006), at para 1.086.; P.S. Atiyah & John N.Adams, *The Sale of Goods*, 10th ed (Harlow, England: Pearson Education, 2001) at 66. Jean Braucher, “Contracting out of Article 2 using a “License” label: a Strategy that should not work for Software Products” (2007) 40 Loy. L.A. L. Rev. 261, 278-279, raises the awkwardness of the application of sale of goods legal framework, e.g. the US *Uniform Commercial Code* to computer software, while still acknowledging that it offers sufficient flexibility to accommodate computer software.

¹³ David Nimmer, Elliot Brown & Gary N. Frischling, “The Metamorphosis of Contract into Expand” (1999) 87 Cal. L. R. 17, at 68ff, reflecting in particular on the application of the US *Uniform Commercial Code* to the licensing of computer software; Gail E. Evans, “Opportunity Costs of Globalizing Information Licenses: Embedding Consumer Rights within the Legislative Framework for Information Contracts” (1999) 10 Fordham Intell. Prop. Media & Ent. L.J. 267, more particularly at 283ff, on the inaptitude of sale of goods legislation to deal with information products. On the difficulties more specific to the application of consumer law to copyright law, see Lucie Guibault & Natali Helberger, “Copyright law and Consumer Protection” (2005) study carried out for the European Consumer Law Group, ECLG/035/05; Natali Helberger & P.Bernt Hugenholtz, “No place like home for making a copy, private copying in European copyright law and consumer law” (2007) 22 Berkeley Tech. L.J. 1061; Niva.Elkin-Koren, “Making Room for Consumers Under the DMCA” (2007) 22 Berkley Technology Law Journal 1119.

goods under sale of goods and consumer law in Part II and the application of copyright exhaustion. In Part IV, I propose a unified approach to the qualification of goods and to the scope of copyright exhaustion through property law and theory. Such an approach enables movement away from the somewhat arbitrary emphasis on the presence of physical supporting media, both with respect to the qualification of goods and the application of copyright exhaustion, and offers an analytical framework that is more inclusive of digital copies distributed online with no physical supporting medium. I conclude in Part V that as much as the introduction in this chapter to the application of consumer law to copyright may foreshadow the erratic nature of the exercise, the inconsistencies that it underscores should not stand in the way of the further exploration of how consumer law can help substantiate consumers' rights to copies of copyright works.

II. Misunderstood dichotomies

An inquiry into the application of consumer law to copies of copyright work begins with two seemingly trivial yet determining questions: are the copies “goods” and how are they made commercially available to consumers? Particularly, the goods-like nature of digital copies of copyright works is unsettled when there is no supporting physical medium (e.g., a CD or DVD) exchanged from hand-to-hand with the delivery of the copyright work (e.g., the musical recording or film).¹⁴ While these two questions of classification (i.e., whether it is a good and whether it is sold or licensed) are not relevant to the application of all consumer law obligations, they are determinant in one important area, i.e., the application of consumer-protection-implied obligations to copies of copyright works.¹⁵ These two requirements of scope originate from the strong underpinnings of sale of good laws for these particular consumer protection obligations.¹⁶ In Canada and the other jurisdictions explored here, the application of the other consumer protection obligations that I analyze

¹⁴ See the report where the authors analysed the laws of 11 countries including the US, the UK, France and other European states by: Marco B.M. Loos, Natali Helberger, Lucie Guibault, Chantal Mak, Lodewijk Pessers, Katalin J. Cseres, Bart van der Sloot & Ronan Tigner, “Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts” (2011) University of Amsterdam, Centre for the Study of European Contract Law (CSECL), Institute for Information Law (IViR), Amsterdam Centre for Law and Economics (ACLE), online: http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm, at 32.

¹⁵ I.e., the application of statutory implied obligations of quality and of fitness for purpose, of correspondence with description, of title, quiet possession and freedom from encumbrances: see Chapter 9.

¹⁶ I.e., consumer-protection-law-implied obligations typically expressly build upon or refer to sale of goods law in the field of consumer implied obligations: see *supra* note 10.

in my thesis¹⁷ do not require the presence of “goods,” nor do they rely on the nature of the legal transaction involved.¹⁸

Although the goods-like nature of copies of copyright works and the legal vehicle through which they are made available to consumers are distinct matters, courts tend to blend the two concepts interchangeably to assess the applicability of sale of goods and consumer law.¹⁹ When the legal requirements for the application of sale of goods and consumer law are not met, similar implied obligations may apply under the common law²⁰ or the CCQ.²¹ This is a small consolation compared to the greater level of protection and greater simplicity that statutory implied obligations offer to consumers.²² In jurisdictions outside Canada, the application of implied obligations to consumer transactions still largely depends on the existence of “goods,” in some jurisdictions more than in others.²³

¹⁷ E.g., more specifically the information disclosure requirements and the prohibition of unfair practices: see Chapter 9, Chapter 10 and Chapter 11.

¹⁸ The implied obligations of sale of goods and consumer law apply only to goods and the information disclosure requirements and prohibitions against unfair practices apply to consumer transactions generally: see Chapter 9.

¹⁹ See the discussion in Part II C of this chapter.

²⁰ *St. Albans City & District Council v International Computers Ltd.*, [1996] 4 All ER 481 (C.A.) [*St. Albans*]; *Gretton (t/a Open Systems Design) v British Millerain Co Ltd (formerly British Millerain (1922) Co Ltd)* (1998) WL 1120719 (HC, TCC) at paras 45- 48.

If the transaction is qualified as one for the provision of services, implied obligations applicable to services may apply. I discuss the distinction between goods and services in Part II B of this chapter.

²¹ E.g., CCQ art 1723- 1731.

²² Robert Bradgate, “Consumer rights in digital products” (2010) online at http://www.google.ca/search?sourceid=navclient&ie=UTF-8&rlz=1T4ADBF_enCA275CA275&q=Bradgate%2c+Consumer+rights+in+digital+products+2010 at 20, refers to three main characteristics of implied obligations under ss. 12 to 15 of *UKSGA*, *supra* note 5: “(a) they are easy to prove; (b) their breach allows the consumer buyer to seek to bring into play a range of powerful remedies; and (c) neither they nor liability for their breach can be excluded where the buyer “deals as consumer.” See also *Ibid* at 49.

²³ For example, in the UK the *UKSGA*, *supra* note 5, provides implied obligations for sale of “goods” (ss 2, 64, 12-14) and the *UKSGA*, *supra* note 5, provides implied obligations in “contracts for the transfer of goods” such as the supply of labour and materials and hire contracts (ss1, 2ff). There is a separate implied term for services at s 13 which provides that the supplier “will carry out the service with reasonable care and skill”... “where the supplier is acting in the course of a business”: *ibid.*; *Directive 1999/44/EC*, *supra* note 5, applies to “goods” (art. 1(2) b, 2 (1)). In the US the *Uniform Commercial Code*, Official Text (2000) (amended 2003) online: <http://www.law.cornell.edu/ucc/ucc.table.html> [*US UCC*], § 2-312, § 2-314, § 2-315 implied obligations also apply to transactions in “goods”.

Given the overall policy objective of consumer protection laws and the additional level of protection that they offer to consumers,²⁴ any issue of scope that may discredit the application of implied obligations to consumer transactions needs to be examined carefully. When this exclusion affects an increasingly large segment of the consumer market, i.e., information products distributed online, there is cause for concern. When it is compounded with the increasing trivialization of the ownership rights in copies of copyright works examined in the Second Part of my thesis, an alarming pattern of diminished rights and protection for consumers starts to take shape.

Commercial copies of copyright works that are sold through the hand-to-hand supply of a physical medium (such as music CDs or film DVDs) are generally characterized as goods in Canada and elsewhere.²⁵ By contrast, the applicability of sale of goods- (and consumer-) law-implied obligations to digital content supplied online is still an unsettled area of the law. The absence of the hand-to-hand supply of a physical medium and the uncertainty of the distinction between “goods” and “services” are at the heart of this equivocalness.

²⁴ I discuss the theoretical justifications of consumer protection obligations in Chapter 10.

²⁵ E.g. in the US, EU, UK and France as it is discussed further below. See *Gerber Scientific Instrument Co. v Bell-Northern Research Ltd.* 1994 CarswellOnt 1029, 17 B.L.R. (2d) 21 (OCA) where the Ontario Court of Appeal upheld the lower court judgement applying the *OSGA*, *supra* note 10, to a computer system, holding that that the supplier of the computer system was in breach of the implied obligation of fitness for a particular purpose (*OSGA*, *ibid* s 15,); See *Lalese Enterprises Inc. v Arete Technologies Inc* 1994 CarswellBC 1220, 59 C.P.R. (3d) 438 (BCSC) where the implied condition of fitness for a particular purpose was held to apply to a customized computer system (hardware and software); *Western Engineering Service Ltd. v Canada Malting Co.*, [1994] OJ No. 2026 (Gen. Div.) whereby sale of goods law was held to apply to a software package; *Classified Directory Publishers Inc. v Image Management Technologies Inc.*, 1995 CarswellOnt 2449 (OCJ(G.D.)) where the court applied the implied condition of fitness for a particular purpose to a computer system (hardware and software); *Michael's Pizzeria Ltd. v LP Computer Solutions Inc.* 1996 CarswellPEI 31, 139 Nfld. & P.E.I.R. 295, 433 A.P.R. 295 (PEI SC TD) where computer system held to constitute “goods” under Prince Edward Island *Sale of Goods Act*; *Villeseche v Total North Communication Ltd.* 1997 CarswellYukon 53 (YCA) where the Yukon Court of Appeal upheld the lower court judgment that the *Sale of Goods Act*, RSYT 1986-1990 implied obligation of merchantability applied to a computer system; *W.J. Caul Funeral Home Ltd. v Pearce*, 1997 CarswellNfld 11, 153 Nfld. & PEIR 252 (NSCTD) where the implied condition of fitness for a particular purpose was held to apply to computer equipment and computer software; *Saskatoon Gold Brokers Inc. v Datatec Computer Systems Ltd.* 1986 CarswellSask 401, 55 Sask. R. 241 (Sask QB) where the Saskatchewan *Sale of Goods Act*, RSS 1978, c. S-1 implied obligation of fitness for a particular purpose was also held to apply to a computer system. In the US, see *RRX Industries Inc. v Lab-Con Inc.*, 773 F.2d 543 (9th Cir. 1985) where the US Court of Appeals, 9th circ., held that a software package constituted “goods” under the California Commercial Code; in the UK, see *St. Albans*, *supra* note 20; *Kingsway Hall Hotel Ltd v Red Sky IT (Hounslow) Ltd*, 2010 WL 1639690 (QB) where the court applied the implied obligations of the *UKSGA*, *supra* note 5, to an off the shelf software package. For a contrary view in the US context, see: Lorin Brennan, “Why Article 2 Cannot apply to Software Transactions” (2000) 38 Duq. L. Rev. 459.

The legal nature of digital copies of copyright works distributed online and whether consumers' rights should extend to the supply of digital content has been at the heart of recent consumer protection reform debates in the EU. Consumer Goods Guarantees²⁶ have been interpreted as not applying to digital content.²⁷ The Green Paper on the Consumer Acquis²⁸ invited Member States to consider the expansion of the European Union regime of consumer sale of goods to the supply of digital content.²⁹ This proposal met fierce resistance,³⁰ with the result that the proposal for reform did not expand the application of the European consumer sales legal framework to the supply online of digital content.³¹ The recent adoption by the European Parliament and the Council of *Directive 2011/83/EU* on consumer rights³² is an attempt to clarify how the European Union intends to classify and regulate consumer transactions of digital content. *Directive 2011/83/EU* deals more specifically with traders' information disclosure obligations and formality requirements in consumer contracts, including distance contracts.³³ It confirms the approach by the EU not to treat digital content as a good when it is supplied with no supporting physical medium exchanged from hand-to-hand, while specifying the type of protection that it deserves.³⁴ The foundations and rationale behind the insistence on the presence of a physical supporting medium exchanged from hand-to-hand are not entirely clear and merit further investigation.

²⁶ *Directive 1999/44/EC*, *supra* note 5.

²⁷ *Directive 1999/44/EC*, *supra* note 5, at art 1 2. (b) defines "consumer goods" as "any tangible movable item" with some exceptions applying to utilities and goods sold by execution or authority of law: *ibid.* EC, *The Green Paper on the Review of the Consumer Acquis* (Brussels: EC, 2006) [Green Paper on the Consumer Acquis] s 5.1, takes the position that *Directive 1999/44/EC*, *ibid.*, does not apply to the supply of digital content, such as online music. It presented the option to extend the scope of the Directive to the supply of digital content: *ibid.*

²⁸ *Supra* note 27.

²⁹ *Ibid.*, at section 5.1.

³⁰ Especially with respect to the distribution of online software, see: Peter Rott, "Download of Copyright-Protected Internet Content and the Role of (Consumer) Contract Law" (2008) 31 J. Consum. Policy, 441 at 452.

³¹ Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM (2008) 614 final, [Consumer Directive Proposal (2008)] art 2 (4) which defines "goods", leaves unchanged the definition of "consumer goods" in *Directive 1999/44/EC*, *supra* note 5.

³² EC, *Council and Parliament Directive 2011/83/EU of 22 November 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council*, [2011] OJ L 304/64 [*Directive 2011/83/EU*]. This directive applies to contracts concluded after 13 June 2014: *Ibid.*, at art 28 (2).

³³ *Ibid.*

³⁴ *Ibid.*

The particularity of copies of copyright works is that they embed dichotomies in varying degrees that have at times misled courts, commentators, law- and policy-makers on how to weigh those diverging interests. Those dichotomies relate primarily to the concepts of tangibility v. intangibility, the distinction between goods and services, and the distinction between sale and licence. I will explore these three dichotomies in that same order. Other dichotomies that are specific to copies of copyright works need not be explored here. They are: the objective v. subjective elements and the functional v. non-functional components of copies of copyright works.³⁵

A. Tangible v. intangible

The tangible v. intangible dichotomy is employed to describe categories of property and goods in property and sale of goods and consumer law. In sale of goods and consumer law, intangible property is frequently excluded from the definition of goods.³⁶ Copyright is generally described as “intangible property” or “choses in action.”³⁷ The tangible v. intangible distinction also derives from the application of an ordinary meaning interpretative approach to the signification of “goods” and “services.”³⁸ A review of sale of goods and consumer protection case law reveals that the application of this dichotomy sometimes gives rise to confusion when it is applied to copies of copyright works.

The tangible and intangible dichotomy manifests itself in three different ways in court decisions and commentators’ analyses on the applicability of obligations implied by sale of goods and consumer

³⁵ These dichotomies contrast goods embedding copyright works from other goods in that the subjective, non-functional elements (e.g., artistic merit, originality) are typically significantly greater than the objective, functional elements. Sale of goods/consumer law would typically protect purchasers (e.g., through implied warranties or conditions of quality, fitness for use and quiet possession) with respect to the objective, functional elements of the copies of copyright works (access, permitted uses, quality of images, sounds, print, etc...).

³⁶ For example, see definition of “goods” in the *OSGA*, *supra* note 10, s 1 (1); *BCSGA*, *supra* note 10, s 1; *US UCC*, *supra* note 23 § 2-103 k); *UKSGA*, *supra* note 5, s 61.

³⁷ For a historical perspective on the debate around the nature of copyright in Canada, see *H.G. Fox, Canadian law of Copyright (Toronto: University of Toronto Press, 1944) at 7-11*, whereby after reviewing various characterizations of copyright, the author concluded that copyright is incorporeal property. See the discussion on the property attributes of copyright in Chapter 5 Part IV.

³⁸ Fiona Smith & Lorna Woods, “A Distinction without a Difference: Exploring the Boundary between Goods and Services in the World Trade Organization and The European Union” (2005) 12 *Colum. J. Eur. L.* 1, at 40ff. As discussed by the authors, the distinction between tangible and intangible is dictated in part by the ordinary dictionary meaning attributed to “goods” and “services”, which is the approach chosen by the authors in the context of assessing the meaning of goods and services in an international trade context, e.g. at the World Trade Organization level: *ibid.*

law.³⁹ The first application of this dichotomy is reflected by the emphasis that courts and commentators place on the presence of a physical medium (tangible) as the vehicle supporting the actual creative intellectual work protected by copyright (often characterized as “intangible,” such as software, a musical work, a film, or a literary work). The second application of the tangible v. intangible dichotomy is one that emphasizes the intangible nature of the intellectual property rights (which are usually retained by the copyright holder) present in the transaction, thereby tainting its characterization as a whole. The third application of the tangible v. intangible dichotomy is one whereby courts and commentators fail to contrast the end result, i.e., the commercialized product, with the intellectual labour-intensive creation that went into it.

The first manifestation of the tangible v. intangible distinction (i.e., the one that places emphasis on the presence of a physical medium exchanged hand-to-hand as the vehicle supporting the actual creative intellectual work protected by copyright) is well illustrated by the landmark English Court of Appeal judgment *St. Albans City & District Council v. International Computers Ltd.*⁴⁰ Sir Iain Glidewell, in a frequently cited *obiter dictum*, stated that the presence or not of a physical medium to supply the copy of the computer software would be the decisive factor to determine whether a computer program qualified as a good or not.⁴¹ Canadian and American courts have also been more readily inclined to find that copies of copyright works are goods in presence of the supply of a hand-to-hand physical object.⁴² In doing so, courts have at times applied a reasoning by analogy and

³⁹ The tangible v. intangible dichotomy is a leading distinction to determine the applicability of sale of goods and consumer laws to a specific transaction: Fridman, *supra* note 12, at 14. For a discussion on the treatment of computer programs as being tangible or intangible see Ken Moon, “The nature of computer programs: tangible? goods? personal property? intellectual property?” (2009) 31 E.I.P.R. 396.

⁴⁰ *St. Albans*, *supra* note 20.

⁴¹ *Ibid.* In that case, it was held that the defendant was under an express contractual obligation to provide the plaintiffs with software which would allow them to accomplish certain functions. It was therefore not necessary to consider the legal ground (e.g. statutory or common law) under which implied obligations would apply. Nourse L.J. indicated concurrence with the *obiter dictum*. See also *Southwark LBC v IBM UK Ltd*, 2011 WL 722364 (QB), at paras 96ff, where in an *obiter dictum* Akenhead J. stated that software could constitute goods under *UKSGA*, *supra* note 5 but in the context of the transfer of a supporting physical medium such as a CD.

⁴² See *supra* note 25. Courts tend to approach contracts for the supply of computer hardware and computer software as a whole as sale of goods: see Barry B. Sookman, *Computer, Internet, and Electronic Commerce Law*, loose-leaf (Toronto:Thomson Carswell, 1988), at para 2.17 (b). In *Arvic Search Services Inc. v Foam Shop Ltd*, 2008 ABPC 256, the court in a *obiter dictum*, stated that a software did not constitute goods. In that case, the issue of the application of implied obligations under the Alberta *Sale of Goods Act*, did not need to be addressed as the issue to be tried revolved around the consequences of non-performance of the contract by both parties. In the US, courts have been willing to consider software alone as involving a transaction in goods. See for example the frequently cited case: *Schroders Inc. v Hogan Systems Inc.*, 522

assimilation.⁴³ Familiar objects such as discs and tapes, which have long been recognized as goods, justify that the predominant feature of the product, e.g., the musical recording, the film, or computer software, also be assimilated to a good.⁴⁴ In *St. Albans*, Sir Iain Glidewell made the distinction between the transfer of a computer disc for money, which would trigger the application of warranties under the applicable sale of goods law as the allegedly defective instructions (e.g., the code in the computer program) were part of the disc, and would have made the disc (i.e. a good) defective.⁴⁵ However, in this case, the mere provision of a computer program did not, even though a disc was involved in the arrangement, trigger the application of sale of goods warranties because the installer had transferred the program himself onto the computer but had retained the disc:

As I have already said, the program itself is not “goods” within the statutory definition. Thus a transfer of the program in the way I have described does not, in my view, constitute a transfer of goods. It follows that in such circumstances there is no statutory implication of terms as to quality or fitness for purpose.⁴⁶

The lower Court in that case had stated, also in *obiter dictum*, that software would constitute goods.⁴⁷ The rejection that computer software are goods, as per the *obiter* by Sir Iain Glidewell, was applied in *Horace Holman Group Ltd. v Sherwood International Group Ltd.*⁴⁸ In the earlier judgment *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd*,⁴⁹ while Lord Penrose acknowledged the

N.Y.S. 2d 404 (N.Y. Sup. Ct., 1987) at para 3) where the *US UCC*, *supra* note 23 (as adopted in the State of New York), was held to apply to software licences even if no hardware was being transferred; *Shema Kolainu- Hear our Voices v Providersoft, LLC*, F.Supp.2d 2010 WL 2075921 (USDC E.D.N.Y. 2010), where the court refers to case law supporting treatment of software licence as good under *US UCC*, *supra* note 23, noting uncertainty in the area. In that case, the parties had agreed to treat the software licence agreement as “goods”; *Gross v Symantec Corporation.*, not reported in F Supp (2d) (ND Cal 2012), at 9 where the court held that a software delivered online with no physical supporting medium qualified as goods under the California UCC.

⁴³ On how courts have had recourse to reasoning by analogy in a *US UCC* context, see Bonna Lynn Horovitz, “Computer Software as a Good under the Uniform Commercial Code: Taking a Byte out of the Intangibility Myth” (1985) 65 B.U. L. Rev. 129, at 146-147.

⁴⁴ *Ibid.*

⁴⁵ *Supra* note 20. See also *Southwark LBC v IBM UK Ltd*, *supra* note 41.

⁴⁶ *Ibid* at 266.

⁴⁷ *St Alban's City and District Council v International Computers Limited* [1995] F.S.R. 686 (QB) at 699: “... I am of the view that software probably is goods within the Act. Programs are, as has been pointed out, of necessity contained in some physical medium, otherwise they are useless. As Mr Mawrey put it, it is just as much a supply of goods as if paint were applied to a wall or printing ink to a blank page. It is not simply abstract information like information passed by word of mouth. Entering software alters the contents of the hardware.”

⁴⁸ 2000 WL 491372 (TCC) [*Horace*].

⁴⁹ 1996 SLT 604 (Outer House).

artificiality of giving prevalence to the supporting medium as the determining factor to qualify the object of the transaction as goods,⁵⁰ the Court refused to treat the supply of computer software as the sale of goods.⁵¹

The application of the reasoning of Sir Iain Glidewell in *St. Albans*, as referred to in *Horace*,⁵² has profound effects on the regulation of digital content distributed online. If copies of copyright works distributed online with no supporting physical media are not goods under the relevant statutory provisions of sale of goods and consumer laws, they cannot benefit from the protection mechanisms offered through implied consumer obligations. This limits the protection to any remaining common law implied obligations, the breach of which can be more difficult to establish than their statutory counterparts.⁵³ Implied obligations, as they apply within the framework of consumer protection law, can be invoked more easily, give rise to a broad range of remedies, and are typically mandatory.⁵⁴ In

⁵⁰ Lord Penrose stated: "It appears to emphasize the role of the physical medium, and to relate the transaction in the medium to sale or hire of goods. It would have the somewhat odd result that the dominant characteristic of the complex product, in terms of value or of the significant interests of parties, would be subordinated to the medium by which it was transmitted to the user in analyzing the true nature and effect of the contract. If one obtained computer programs by telephone, they might be introduced into one's own hardware and used as effectively as if the medium were a disk or CD or magnetic tape." *Ibid*, at 608-609. On the triviality of the physical medium in comparison to the computer programming see also Horovitz, *supra* note 43, at 132-133. The confusion that arises from the presence of intellectual property rights and other intangibles and the physical medium supporting it was noted by Andrew Rodau, "Computer Software: Does Article 2 of the Uniform Commercial Code Apply?" (1986) 35 Emory L.J. 853, at 861-862. The artificiality of this distinction in an increasing world of online distribution of copyright works (and generally information products) is also discussed by Atiyah & Adams, *supra* note 12, at 68-71. The authors come to this conclusion by a consequential argument, as to whether liability for a defective software should be different based on how the software is delivered, i.e. a disc or online (answering this question in the negative).

⁵¹ *Supra* note 49. In that case, Lord Penrose qualified the software license agreement as a *sui generis* contract.

⁵² *Ibid*.

⁵³ *St. Albans*, *supra* note 20, Sir Iain Glidewell in *obiter*, stated that an implied obligation would apply at common law to computer software supplied under contract, citing: *Trollope & Colls Ltd v N.W. Metropolitan Regional Hospital Board* (1973) 1 WLR 601 at 609: "An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract; it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them; it must have been a term that went without saying, a term which, though tacit, formed part of the contract which the parties made for themselves." Sir Iain Glidewell then concluded on that basis that "In the absence of any express term as to quality or fitness for purpose, or of any term to the contrary, such a contract is subject to an implied term that the program will be reasonably fit for, i.e. reasonably capable of achieving the intended purpose." The court applied this passage of Sir Iain Glidewell's *obiter* in *Horace*, *supra* note 48.

⁵⁴ See the discussion on implied obligations in Chapter 9 Part II. In a UK context, see Bradgate, *supra* note 22 at 26.

some cases, copies made accessible online could benefit from the protection of implied obligations as they apply to services.⁵⁵

*Directive 2011/83/EU*⁵⁶ places a similar emphasis to that of Sir Iain Glidewell in *St. Albans*⁵⁷ on the presence of a supporting physical medium exchanged from hand-to-hand to determine whether copies of copyright works (“digital content”) qualify as a good or not. On the one hand, copies of copyright works that are supported by a physical medium exchanged from hand-to-hand are “goods.”⁵⁸ On the other hand, copies distributed online with no physical supporting media exchanged from hand-to-hand are neither goods nor services, but of a *sui generis* nature.⁵⁹ This directive harmonizes the laws of Member States with respect to traders’ information disclosure requirements in consumer contracts, including distance or off-premises contracts, as well as with respect to formal requirements for these specific types of contracts.⁶⁰ While it clarifies that the right of withdrawal applies to digital content regardless of its status as a “good,”⁶¹ the impact of this *sui generis* treatment and whether it will be replicated in future European Union regulation of consumer transactions are unclear.

The presence of a physical tangible product may be pertinent to determine whether it is a good when, for instance, the copy of the copyright work is ancillary to the whole product (such as embedded software in a camera or digital recorder). It seems less justified as a defining attribute when the physical embodiment is in fact the ancillary part of the product (such as the CD of a musical recording or the DVD of a film).⁶² As acknowledged by Lord Penrose in *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd*,⁶³ the presence or not of a hand-to-hand physical supporting medium (such as a

⁵⁵ This would then give rise to different regimes of protection. The distinction between goods and services is discussed in Part II B. of this chapter.

⁵⁶ *Supra* note 32.

⁵⁷ *Supra* note 20.

⁵⁸ *Directive 2011/83/EU*, *supra* note 32, Preamble, Recital 19.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, art 5ff.

⁶¹ *Ibid.*, Preamble, Recital 19.

⁶² See Bradgate, *supra* note 22 at 40-41, who analogizes such reasoning to placing more emphasis on the packaging than the substance of the product as the test of its qualification, such as focusing on the bottle of a bottle of whiskey to determine the nature of whiskey.

⁶³ *Supra* note 49.

disc) with the copy of a copyright work (such as software) as a determinant factor of its nature as good is somewhat artificial.⁶⁴

There is no requirement of tangibility in the definition of “goods” as understood in that narrow sense.⁶⁵ The plausible explanation for this requirement is a misunderstanding about the typical exclusion of intangible property (choses in action) from the definition of goods.⁶⁶ Depending on the circumstances surrounding their access, digital copies of copyright works can share the attributes that are common to other goods. The *tangible v. intangible* divide dissolves when one acknowledges the physical nature of digital works. While they cannot be touched, and in some cases not seen, the pixels and binary codes that make up the musical recording or the film are as “physical” as the CDs or DVDs that support a digital copy.⁶⁷

In the context of the US Uniform Commercial Code [US *UCC*], the requirement of “movability” has been raised as the predominant factor having taken precedence over the divide between tangible and intangible, prominent in the earlier common law,⁶⁸ to determine whether products are “goods” or not.⁶⁹ Adopting a purposive approach to the US *UCC* to assess the nature of computer software, one commentator suggests that the concerns for excluding intangibles such as “choses in action” from the definition of goods in the US *UCC* are not present in the context of this information product.⁷⁰

⁶⁴ *Ibid.*

⁶⁵ See Bradgate, *supra* note 22, at 41-42, 50. See the definition of goods under sale of goods law legislation in Canada, *supra* note 12, *infra* note 132. However, the EU makes that distinction clearly *Directive 2011/83/EU*, *supra* note 32, Preamble, Recital 19.

⁶⁶ I discuss the undue emphasis that is placed on the presence of intangible property rights in copies of copyright works further below in this section.

⁶⁷ An interesting analogy is found in art 906 CCQ, which states that “Waves or energy harnessed and put to use by man, whether their source is movable or immovable, are deemed corporeal movables.”

⁶⁸ As this is still reflected by the exclusion of choses in action from the definition of goods, including under the US *UCC*, *supra* note 23. Horovitz, *supra* note 43, at 137-138 explains how the common law employed a strict definition of goods: “The common-law definition of what was or was not a good was strict. At common law only those things that could be the subject of larceny or were susceptible of delivery could be the subject matter of a sale. Choses in action were not considered to be goods because they were incapable of delivery. The law merchant, from which Article 2 of the UCC eventually developed, governed only those things which could be bought and sold commercially. Intangibles were viewed as personal rights incapable of sale; these rights traveled with the owner, were personal to him, and died with him.”

⁶⁹ See Horovitz, *supra* note 43 at 138, a frequently cited article by US courts when confronted to qualifying the nature of computer software as good or service.

⁷⁰ Horovitz, *supra* note 43 at 151-152: “The fact that a computer program cannot be seen or felt should not preclude UCC coverage, as the UCC does not make those qualities the test for exclusion. The type of intangibility meant to be excluded from Article 2, that of choses in action, is different from the type of intangibility characteristic of software. That program instructions are intangible does not rule out UCC

While the *UCC* does distinguish between goods and things in action, excluding the latter from coverage, software, no matter how it is classified, should not fall within this exclusion. ... It is unlike intangible legal rights, intangible laws and principles, and intangible assets. A program is intangible in the sense that it cannot be touched or felt, but not in the sense that it cannot be moved and identified to a contract.⁷¹

From that perspective, movability, transferability, and the possibility of identification at the time of sale are the critical factors for the qualification as goods, not tangibility (in the narrow sense of the term).⁷² Computer programs and other copies of copyright works are tradable objects regardless of their material form, unlike perhaps forms of intangible property or choses in action that are not tradable objects falling under the ambit of sale of goods and consumer laws.

Movability implies something “to take with oneself”⁷³ and is the underlying requirement for the transfer of ownership as another means to distinguish specific goods from other products.⁷⁴ Referring to the definition of “copy” in the US *Copyright Act*,⁷⁵ Jean Braucher notes the incongruity of not treating copies of software as “tangible material objects.” If it were so, it would not prohibit making unauthorized copies under that act.⁷⁶ For Braucher:

There is no good reason not to extend this version of tangibility, assuming tangibility is necessary, to the realm of Article 2.⁷⁷ Software copies are perceivable by a machine and in that sense tangible, making them easily “things,” which may not require tangibility. Software copies can be moved in various ways, including on computers and disks and by electronic download.⁷⁸

applicability, as programs can be identified, moved, transferred, and sold in the same manner as other pieces of personal property classified as goods.”

⁷¹ *Ibid*, at 162. For a contrary view, e.g. that computer software does not fulfill the requirement of “movability” see Brennan, *supra* note 25 at 535-536.

⁷² Horovitz, *supra* note 43 at 151. For a contrary view in the case of computer software fulfilling the requirement of being “identifiable” under the U.S. Uniform Commercial Code regime, see Brennan, *supra* note 25 at 536-537.

⁷³ As in the concept of “personal” property.

⁷⁴ See Smith & Woods, *supra* note 38 at 45.

⁷⁵ The US *Copyright Act*, 17 USC, § 101 defines copies as “material objects . . . from which the work can be perceived . . . either directly or with the aid of a machine . . .”. “Copy” is not defined in Canada’s *Copyright Act*, R.S.C. 1985, c. C-42 [CCA]. The concept in Canadian copyright law (and other laws worldwide) of fixation of copies of copyright works is discussed in Part II A.

⁷⁶ Braucher, *supra* note 12 at 268.

⁷⁷ E.g. referring to article 2 of the *US UCC*, *supra* note 23, which is the article that regulates contracts of sales.

⁷⁸ Braucher, *supra* note 12 at 268.

Braucher points to movability and the ability to perceive or identify the software copies as the determinant attributes to assert their goods-like nature. Digital copies of copyright works purchased online possess these two attributes. BEUC, The European Consumers' organization,⁷⁹ made a similar analysis in a position paper on the regulation of digital products in the European Union, emphasizing consumers' ability to access digital products on a permanent basis, and to store them, as determinant factors of the goodness of digital content.⁸⁰ *Directive 2011/83/EU* opted for a different approach, treating digital content with no physical supporting medium exchanged hand-to-hand as neither goods nor service, while clarifying the level of protection that it deserves.⁸¹ International classifications, e.g., in the area of trademarks, provide insights on the classification of software as goods regardless of the presence of a supporting tangible medium.⁸²

The second common application of the *tangible v. intangible* dichotomy in court decisions and commentators' analyses is one that places undue emphasis on the existence of the copyright holders' exclusive rights in the copyright work itself. In personal property terms, these exclusive rights are often referred to as "choses in action" or "intangible personal property" and are specifically excluded from definitions of goods in the relevant sale of goods or consumer law statutes.⁸³ At times, courts

⁷⁹ BEUC, The European consumers' organisation, is the umbrella organisation for 42 independent national consumer organisations across Europe. Its main task is to represent the interests of these organisations and all consumers across Europe: see BEUC, The European consumers organisation official website at: <http://www.beuc.org/Content/Default.asp?PageID=591>.

⁸⁰ BEUC, "Digital Products, How to include them in the Proposal for a Consumer Rights Directive", Position Paper, Brussels, 2010, available online at <http://www.beuc.org/Content/Default.asp?PageID=2135>, at 3.

⁸¹ *Supra* note 32, Preamble, at recital 19.

⁸² Under the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks*, June 15, 1957, as amended, online: http://www.wipo.int/treaties/en/classification/nice/trtdocs_wo019.html, there are 45 registration classes, 34 for goods and 11 for services. Class nine (goods) would cover software. The explanatory notes to Class nine states that this class includes: "all computer programs and software regardless of recording media or means of dissemination, that is, software recorded on magnetic media or downloaded from a remote computer network." International classification of goods and services under the Nice Agreement, 10th edition, online: <http://www.wipo.int/classifications/nivilo/nice/index.htm?lang=EN#> The trade-mark classification system fulfills different purposes: i.e. it allows trade-mark applicants to define for which types of goods and services they (intend to) use their trade-mark and claim exclusive rights. In Canada, "software" falls under the classification of wares and/or of services for the purpose of trade-marks registration: Canadian Intellectual Property Office, "The Wares and Services Manual", online: <http://www.ic.gc.ca/app/opic-cipo/wrs/dsplyPblcSrch.do>.

⁸³ *OSGA*, *supra* note 10, s 1(1), defines goods as "chattels personal" other than "things in action", which dictates the scope of application of implied obligations in consumer contracts (*OCPA*, *supra* note 10, ss 9 (2),9(3)). *OCPA*, *supra* note 10, s 1, has a broader definition of goods as "any type of property" which

and commentators are confused by the presence of intangible property rights of copyright holders when ascertaining the nature of the object of study, e.g., copies of the copyright works *per se*.⁸⁴

An important distinction needs to be made between the rights in copyright works⁸⁵ and in commercial copies of the copyright works.⁸⁶ In this exercise, the intangible nature of the rights of copyright holders is not in itself conclusive, as noted in the two leading US cases, *Advent Systems Ltd. v. Unisys*

would apply to other consumer protection obligations under the *OCPA*, *ibid*. See *BCSGA*, *supra* note 10, s. 1(a). See also *Alberta Sale of Goods Act* RSA 2000, c. S-2 [*ASGA*], s. 1(h); *Alberta Fair Trading Act*, RSA c. F-2 [*AFTA*], s. 1(1) (e). Certain definitions refer to “tangible” personal property: *Manitoba Consumer Protection Act*, RSM 1987, c. C200, C.C.S.M. c. C200 [*MCPA*], s. 1(1); *New Brunswick Consumer Product Warranty and Liability Act*, SNB 1978, c. C-18.1 [*NBCPWL*], s. 1(1); *Directive 1999/44/EC*, *supra* note 5, art. 1 (2) b), defines goods as any “tangible” movable item, with some limited exceptions. *US UCC*, *supra* note 23, § 2-103 (k) defines goods as “all things that are movable at the time of identification to a contract for sale”, and includes “manufactured goods”, but excludes information and “choses in action.” The *UKSGA* *supra* note 5, s. 61 defines “goods” as including all “personal chattels, excluding choses in action and money”. A traditional distinction between “choses in action” and “choses in possession” is that in the former case, recovery necessitates court intervention as choses in action cannot be physically possessed: see *Bradgate*, *supra* note 22, at 35.

⁸⁴ *Robinson v Graves* [1935] 1 K.B. 579 where the Court of Appeal (UK) needed to assert whether the commissioning of a painting was a contract for skill and labour or one for the sale of goods. At least three justices invoked the exclusive copyright of the painter, which could only be assigned to the eventual purchaser of the painting by an act in writing, to conclude that the contract was one of skill and labour and not for the sale of goods, confusing the copyright with the property rights in the physical embodiment of the painting. See *Braucher*, *supra* note 12 at 262. In *Southwark LBC v IBM UK Ltd*, *supra* note 41, the Queen Bench Division (UK) decided that the *UKSGA*, *supra* note 5 implied obligations did not apply to the software because it was not sold to the purchaser. In doing so, the court placed particular emphasis on the intellectual property rights of the supplier, which remained with the supplier, and on other restrictive terms which pertained to the copy of the copyright work (i.e. no right of transfer, obligation to destroy the copy upon termination) with less emphasis on the fact that the licence in the copy of the software was perpetual (which could indicate that the copy had been transferred to the purchaser). In a US context, another case illustrates the particular emphasis on the intellectual property rights of the supplier. In *Architectronics, Inc. v Control Systems, Inc.* 935 F.Supp. 425 (SDNY 1996), the US District Court, SD New York held that the transaction involving the delivery of an unfinished customized software did not qualify as a sale of goods because the contract involved the transfer of the intellectual property rights of the copyright holder to the other party. The court came to that conclusion in spite of the fact that a product, the actual customized computer software, was also transferred to the other party with functionalities and operational aspects (at para 9). The confusion between the exclusive rights of copyright holders and the ownership rights in the copy of the work also arises in the context of various exceptions of copyright infringement including 17 USC, § 117 “Limitations on exclusive rights: Computer programs.” The same confusion arose in *Advanced Computer Services of Michigan, Inc. v MAI Systems Corporation* 976 F.Supp. 149 (ED Virginia 1996). See : *Applied Information Management, Inc. v Daniel P. ICART and Brownstone Agency, Inc.*, (1997) 976 F.Supp. 149 (EDNY 1996), at para 1-5. See also *Loos & al.*, *supra* note 14 at 15.

⁸⁵ I.e. intangible incorporeal movable property right.

⁸⁶ I.e. as discussed throughout Part II A, the copy of the copyright work, such as a software program is treated variably by courts as tangible or intangible based on the presence or not of a hand to hand physical supporting medium or based on a substantiality test.

*Corp*⁸⁷ and *Triangle Underwriters Inc. v. Honeywell Inc.*,⁸⁸ in which computer software was held to constitute goods under the relevant statutes.⁸⁹ In *Triangle Underwriters*, the US District Court of E.D. New York observed:

Although the ideas or concepts involved in the custom designed software remained Honeywell's Intellectual Property, Triangle was purchasing the product of those concepts. That product required efforts to produce, but it was a product nevertheless, and though intangible, is more readily characterized as "goods" than "services."⁹⁰

To be sure, the copy of a musical recording for which the copyright has expired (i.e., in which the copyright in the musical work, sound recording and performers' performance no longer subsists) does not change the nature of what the consumer is accessing, e.g., the copy of a musical work. Whether there is intangible copyright attached to the copy of the musical work or not should not be conclusive for the purpose of determining the nature of this object.⁹¹

The third application of the *tangible v. intangible* dichotomy in the jurisprudence and commentators' analyses is a variation of the second. It occurs through the particular emphasis placed on the ideas, the artistic or intellectual effort or quality that go into the completion of a copyright work, i.e., intangibles,⁹² without paying similar respect to the end result.⁹³ The attention devoted to the labour

⁸⁷ 925 F.2d 670 (C.A.3 Pa. 1991) [*Advent Systems*].

⁸⁸ 457 F. Supp. 765 (EDNY 1978). Affirmed on this issue: 604 F.2d 747 (CANY 1979) [*Triangle Underwriters*].

⁸⁹ The distinction between the intangible intellectual property rights of the copyright holders which often remain their property and the nature of the product delivered to the purchaser was made in *Triangle Underwriters*, *supra* note 88. This case involved the supply of turnkey system including hardware, custom application software, training services and maintenance support services.

⁹⁰ *Ibid.*

⁹¹ By contrast, the intangible nature of the rights of the copyright holder could be relevant to ascertain whether, in a transaction under which the copyright holder assigns her copyright to another party, sale of goods laws apply or not. See: Atiyah & Adams, *supra* note 12 at 66: "...items of intellectual property such as copyrights, patents and trademarks are not personal chattels or corporeal movables and so fall outside the definition, although of course goods may exist which embody these intellectual property rights." See also, Rodau, *supra* note 50 at 882.

⁹² For example in the case of software, it is reflected in the algorithms, coding instructions, sequences leading to a software which performs distinct functions.

⁹³ This is particularly the case for contracts involving the delivery of a prototype or customized software or other product, in spite of the fact that the end product involves a physical, tangible, movable medium. Courts seem to be paying particular attention to the presence or not of standard commercialized product (a good) or an unfinished product (such as a prototype). For example, see *TK Power, Inc. v. Textron, Inc.* 433 F.Supp.2d 1058 (NDCal 2006) where the court held that the delivery of prototypes was a contract of services not goods. Textron was bargaining more for TK's "knowledge, skill, and ability." The court

intensiveness of copyright works has also given rise to confusion about how courts determine elements of a transaction as “goods” or “services,” an important distinction that I discuss further below.⁹⁴ In *Advent Systems*, the United States Court of Appeals, Third Circuit, made the distinction between the two components embedded in copies of copyright works, i.e., the ideas and the commercialized end result, and the need to focus on the latter:

Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners. An analogy can be drawn to a compact disc recording of an orchestral rendition. The music is produced by the artistry of musicians and in itself is not a “good,” but when transferred to a laser-readable disc becomes a readily merchantable commodity. Similarly, when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good.⁹⁵

In that case, the Court held that computer software was a good for the purposes of the relevant statute.⁹⁶ Courts make similar distinctions in strict liability cases whereby only the “tangible” end result may qualify as a product and may fall under the strict liability regime, as opposed to the information, ideas, expression embedded in them.⁹⁷ Thus, the presence of intangibles, such as ideas

assimilated the facts in this case to and applied the reasoning of the court in *Data Processing Services, Inc.*, 492 N.E.2d at 318-19, (customized software held to be a service). There is inconsistency in the case law regarding the distinction between contracts for the sale of goods and contracts for labour and material as this is discussed in Part II B of this chapter.

⁹⁴ See the discussion on the confusion that resides in the distinction between goods and services in Part II B of this chapter.

⁹⁵ *Supra* note 87.

⁹⁶ *Ibid.* See also *Keillian West Ltd. v Sportspage Enterprises Ltd.* (1982), 23 Alta . LR (2d) 199 (QB) where the court made the distinction between the labour and the end product to decide that a contract for the printing of 20,000 sports programmes was a contract for the sale of goods, not for the provision of services: “There is no reason to suppose that the substance of the contract was the skill and labour involved in the production of the programmes rather than the programmes themselves.”

⁹⁷ For example in *Winter v G.P. Putnam's Sons*, 938 F.2d 1033 (9th cir. 1991) the US Court of Appeals, Ninth Circuit, made the distinction between the ideas, expression and commercialised end result: “A book containing Shakespeare's sonnets consists of two parts, the material and print therein, and the ideas and expression thereof. The first may be a product, but the second is not. The latter, were Shakespeare alive, would be governed by copyright laws; the laws of libel, to the extent consistent with the First Amendment; and the laws of misrepresentation, negligent misrepresentation, negligence, and mistake. These doctrines applicable to the second part are aimed at the delicate issues that arise with respect to intangibles such as ideas and expression. Products liability law is geared to the tangible world.” In that case, the plaintiff claimed that product strict liability regime applied to the publishers of a book on mushrooms on which they relied and as a result of which they became very sick after having eaten certain mushrooms. See also: *Sanders v Acclaim Entertainment, Inc.* 188 F.Supp.2d 1264 (D.Colo.2002) and *James v Meow Media, Inc.* 90 F.Supp.2d 798 (WDKy 2000).

and information,⁹⁸ in the creation or commercialized end result is not mutually exclusive of the latter being defined as goods. It is almost inconceivable that ideas, concepts, trade secrets, information in the development process,⁹⁹ or the end product are not embedded in goods.

The classification of various forms of property is not foreign to the concept of transformation, e.g., from immovable to movable property (or from real to personal property in the Anglo-American tradition) depending on the context.¹⁰⁰ While sounds and visual elements have an intangible nature that may well form the essence of a musical recording or a film, when embedded in a commercialized product through their registration in binary codes or otherwise they form part of “goods.”¹⁰¹

To sum up on the effects of the application of the *tangible v. intangible* dichotomy, the emphasis that is placed on the presence of a physical supporting medium exchanged from hand-to-hand to decide whether copies of copyright works are goods is somewhat artificial. As I discuss below, the same comment can be made with respect to the need of this supporting medium to determine the application of the exhaustion or first sale doctrine in copyright law.¹⁰² The artificiality of the requirement of a physical supporting medium exchanged hand-to-hand can be remedied by a broader definition of “tangible” (i.e., one that acknowledges the physicality of digital copies distributed online regardless of the presence of a supporting physical medium exchanged from hand-to-hand) in those jurisdictions where it is a requirement for their determination as goods,¹⁰³ and by focusing on movability, transferability, identification (perception), which entail a permanent, open-ended autonomous access, as the determinant attributes of goods.¹⁰⁴ One additional complexity of copies of copyright works is

⁹⁸ “Information” is often qualified as an intangible and excluded therefore from the definition of goods in sale of goods statutes. In the US, information is explicitly excluded from the definition of goods in the *US UCC*, *supra* note 23, § 2-103 (k).

⁹⁹ As this was noted in *Crescent Amusement Co. v Carson*, 23 Beeler 112, 187 Tenn. 112, (S.W.2d 27 Tenn. 1948): “There is scarcely to be found any article susceptible to sale or rent that is not the result of an idea, genius, skill and labour applied to a physical substance. A loaf of bread is the result of the skill and labour of the cook who mixed the physical ingredients and applied heat at the temperature and consistency her judgment dictated. A radio is the result of the thought of a genius, or several such persons, combined with the skill and labour of trained technicians applied to a tangible mass of substance. An automobile is the result of all these elements, and of patents, etc.; and so on, ad infinitum.”

¹⁰⁰ For example, in the civil law tradition, see CCQ art 900-903.

¹⁰¹ In the context of the nature of computer software, see Rodau, *supra* note 50 at 875.

¹⁰² See the discussion in Part III of this chapter.

¹⁰³ For example *Directive 1999/44/EC*, *supra* note 5, and *Directive 2011/83/EC*, *supra* note 32.

¹⁰⁴ I discuss the significance of the attribute of permanence and autonomous open-ended access in the distinction between goods and services: see Part II B of this chapter.

that they are often commercialized through licence agreements that affect their “transferability,” a subject that I address below.¹⁰⁵

At other times, the difficulty in recognizing the goods-like nature of copies of copyright works is attributable to an undue emphasis that is placed on the intangible intellectual property rights that copies contain, or on the intangible intellectual labour and creativity that went into the creation of the end product. The intangible property (“choses in action”) nature of the exclusive copyright embedded within a copy of a copyright work bears little relevance to the determination of whether the copies are goods or not. The intellectual or creative concepts or ideas leading to the commercialized end result that is the copy should have no particular influence because similar intangibles are present in other goods, albeit to varying degrees.

The exclusion of copies of copyright works from the definition of “goods” has radical effects in that it precludes the application of the implied obligations of sale of goods and consumer law to copies of copyright works, an important component of consumer protection law.¹⁰⁶ In some cases, the obligations may give rise to implied obligations applying to services, which then gives rise to different and generally lower levels of protection.¹⁰⁷ Otherwise, implied obligations at common law could apply, but they are more limited in scope and generally more difficult to establish than statutory implied obligations.¹⁰⁸ The discussion on the other two dichotomies below offers further insights that critically challenge the resistance against treating digital copies of copyright works distributed online as goods.

B. Goods v. services

The classification of products as goods or services remains a nebulous area of sale of goods and consumer protection law.¹⁰⁹ Uncertainty about the difference between goods and services stems from

¹⁰⁵ See the discussion on the distinction between sale and licence in Part II C of this chapter.

¹⁰⁶ Bradgate, *supra* note 22 at 26.

¹⁰⁷ The distinction between goods and services and the different levels of implied obligations that apply to them is discussed further below in Part II B of this chapter.

¹⁰⁸ Bradgate, *supra* note 22 at 20.

¹⁰⁹ For a review of Canadian case law characterizing contracts as sale of goods or service agreements, or a combination of both, i.e. for “work and material”, see also Fridman, *supra* note 12 at 16ff. See also, Jacob S. Ziegel & Anthony J. Duggan, *Commercial and Consumer Sales Transactions, Cases, Text and Materials*, 4th ed. (Toronto: Edmond Montgomery publications limited, 2002) at 49-61. For the European

the confusion about the difference between the labour involved to deliver the commercialized end result and the end result itself.¹¹⁰ It also flows from the combination of goods and services in the same transaction.¹¹¹ This is especially true when there is no physical component exchanged from hand-to-hand in the transaction, for example, when copies of copyright works are transferred online to consumers through downloads from the Internet. In such cases, the tendency is to forget that the transaction also involves the transfer of copies of copyright works and not only services. The distinction is important because different levels of legal protection apply to purchasers of goods and services under sale of goods and consumer law.¹¹² It is also a determinant factor of the application of copyright exhaustion.¹¹³

The uncertain boundaries between what constitutes goods and services are unlikely to disappear in the information age. This is true with respect to copies of copyright works distributed online with no physical supporting medium exchanged from hand-to-hand—copies which may qualify as goods, services, or be of a *sui generis* nature.¹¹⁴ The manner by which they are accessed (e.g., by

Union and World Trade Organization context, see Smith & Woods, *supra* note 38, on the distinctions between goods and services. In the context of the World Trade Organization, the treatment of digital products distributed online has not been settled and is the object of a work programme on electronic commerce: online at http://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm. See also: Tania Voon, “A New Approach to Audiovisual Products In The WTO: Rebalancing Gatt And Gats” (2007) 14 UCLA Ent. L. Rev. 1., at 8-9. The uncertainty of the proper treatment of these products as goods or services needs to be understood within the economic, political and legal context proper to the World Trade Organization treatment of goods and services: *Ibid.* This discomfort to treat digital copies of copyright works as goods is discussed in Part II A of this chapter.

¹¹⁰ For example, see: *TK Power, Inc. v Textron, Inc.*, *supra* note 93; *Systems America, Inc. v Rockwell Software, Inc.* not reported in F.Supp.2d, 2007 WL 218242, (NDCal 2007), where the court focused on the development aspect, e.g. of a computer software, to determine that it was a contract for services, rather than focusing on the existence of an end product, the newly developed software. Horovitz, *supra* note 43 at 143, explains the need to make the distinction between the labour intensiveness of several information products and the end results. The distinction between services that are applied to perfect goods from other forms of services is a helpful distinction in that respect. See *Micro Data Base Systems, Inc. v Dharma Systems Inc.*, 148 F.3d 649 (7th Cir. 1998). The need to draw the distinction between the two forms of labour in a contract involving the supply of customized computer software was made in the leading case *Triangle Underwriters, Inc. v Propulsion Technologies, Inc. v Attwood Corp.* 369 F.3d 896 (5th Cir. 2004) where the US Court of Appeals, 5th circuit, characterized the sale of unfinished propeller castings as goods in spite of the contract contemplating substantial services from supplier.

¹¹¹ See the discussion in Part II B of this chapter.

¹¹² *Ibid.*

¹¹³ See the discussion in Chapter 3 Part II F and in Part III of the present chapter.

¹¹⁴ In the absence of a hand to hand physical medium there remains confusion on the nature of digital content which can result in a qualification as a service. In Trib gr inst Nanterre, 6th Chamber, 15 Decembre 2006, *Association UFC Que Choisir v Société Sony France, Société Sony United Kingdom Ltd*, online : http://www.legalis.net/jurisprudence-decision.php3?id_article=1816, the supply of downloadable musical recordings through an Internet platform was qualified by the court as the supply of services under the

downloading or streaming) has an important bearing on their classification as goods or services. Whether a consumer downloads a commercial copy of a copyright work or streams a copyright work involves different acts reserved to copyright holders with implications for the collective management of copyright.¹¹⁵ Even in cases where copies of copyright works distributed online qualify as goods, it is increasingly hard to conceive experiencing such “goods” without the operation of a service of some sort including Internet access, cell phone services, or web storage-space services.¹¹⁶ The combination of goods with services causes additional confusion at times. For instance, when copies of copyright works are distributed online, there is a service delivery component that can give rise to doubt about the proper characterization of the transaction as a whole.¹¹⁷

When transactions involve a combination of goods and services, courts tend to apply an essential character of the transaction test¹¹⁸ or substantiality test¹¹⁹ to determine, on a case-by-case basis, whether the commercial transaction is one for goods or services. Although the application of these

French *Code de la consommation*. Directive 2011/83/EU, *supra* note 32, Preamble, Recital 19, treats such copies of copyright works as neither goods or services. see Séverine Dusollier, *Droit d'auteur et protection des oeuvres dans l'univers numérique*, 2d ed. (Bruxelles: Larcier, 2007) [Dusollier 2007] at 395-396, 399 who holds that copies of copyright works downloaded from the internet cannot be the object of a sale but rather the provision of a service, conceding however that there is a product involved in the transaction but that the transmission of the product (the copy) characterizes the whole transaction as the provision of services. See also *ibid*, at 382.

¹¹⁵ *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 at para 28, where the Supreme Court made the distinction between downloading and streaming as follows: “Although a download and a stream are both “transmissions” in technical terms (they both use “data packet technology”), they are not both “communications” for purposes of the *Copyright Act*. This is clear from the Board’s definition of a stream as “a transmission of data that allows the user to listen or view the content at the time of transmission and that is not meant to be reproduced” (para 15). Unlike a download, the experience of a stream is much more akin to a broadcast or performance.” The Court held that the online delivery of a permanent copy of a video game did not amount to a “communication” under *CCA*, *supra* note 75, s 3(1)(f): *ibid*, at para 43. See also further reference to that case in Part III of this chapter.

¹¹⁶ I. e., what is commonly referred to as the “cloud” phenomenon.

¹¹⁷ This is the case in the context of the World Trade Organization qualification of such products as goods or services. Voon, *supra* note 109, at 17-18, proposes that in the context of the World Trade Organization agreements, such products should be treated as services. Braucher, *supra* note 12, at 269-270 notes the artificiality of the distinction between a copy of software that is preloaded in a physical medium from one that is being downloaded.

¹¹⁸ *Preload Co. of Can. Ltd. v Regina (City)*, (1958) 23 WWR 433, 13 DLR (2d) 305 (Sask CA) at paras 51ff; aff’d SCC: [1959] SCR 801; *Keillian West Ltd. v Sportspage Enterprises Ltd.*, *supra* note 96.

¹¹⁹ In a US context, see for example *Advent Systems*, *supra* note 87; *Colonial Life Ins. Co. of America v Electronic Data Systems Corp.* 817 F.Supp. 235 (DNH 1993); *In re Mesa Business Equipment, Inc.*, 931 F.2d 60 (CA 9 1991); *Synergistic Dahlmann v Sulcus Hospitality Technologies, Corp.* 63 F.Supp.2d 772 (ED Mich.1999); *Allstate Life Ins. Co. v Peoplesoft, Inc.* not reported in F.Supp.2d, 2004 WL 1375383 (ND Ill. 2004); *ePresence, Inc. v Evolve Software, Inc.* 190 F.Supp.2d 159 (D.Mass. 2002); *Heidtman Steel Products, Inc. v Compuware Corp.* Not Reported in F.Supp.2d, 2000 WL 621144 (NDOhio 2000).

tests may flow from valid procedural requirements and allow flexibility, uncertainty remains on the ultimate treatment of mixed transactions as a whole,¹²⁰ and, by rippling effect, on the boundaries between goods and services.

The distinction between goods and services affects not only the scope of protection available to purchasers in sale of goods and consumer law, but also the nature of claims¹²¹ and the applicable regime of liability. Implied obligations applicable to goods impose a strict liability regime where consumers need to prove that goods are not meeting certain standards, e.g., of quality or fitness for use, while implied obligations applicable to services apply a fault-based regime where consumers must prove that the supplier was negligent in how the services were provided.¹²² It also affects the nature of remedies available¹²³ and involves evidentiary and statute of limitations considerations.¹²⁴

While information disclosure obligations and protection against unfair commercial practices typically apply equally to transactions of “goods” and “services,”¹²⁵ this is not the case with respect to implied obligations (e.g., of quality, fitness for purpose, correspondence with description, title, and quiet

¹²⁰ The uncertainty about the qualification of software license agreements as falling under goods or services under the *US UCC*, *supra* note 23 remains, as recently noted by the US District Court ED New York in *Shema Kolainu- Hear our Voices v Providersoft, LLC*, *supra* note 42.

¹²¹ For instance if the transaction is characterized as one for services, a successful claim would lie in an actionable tort for example negligent misrepresentation or breach of contract.

¹²² Bradgate, *supra* note 22 at 28-29. See the discussion in Chapter 9 Part II A. In the case of services, for example under the *OCPA*, *supra* note 10, s 9(1) the implied warranty applicable to services is that the services are of a “reasonably acceptable quality.” See also *MCPA*, *supra* note 83, s. 58(6), which provides a non-mandatory implied warranty, “that the services sold shall be provided in a satisfactory manner.”; and *UKSGSA*, *supra* note 5, s 13, which provides that “supplier will carry out the service with reasonable care and skill.”

¹²³ See the report analysing the laws of 11 states with respect to the regulation of digital content, mainly in Europe, including EU law, the UK, France, and also of the US: Loos & al., *supra* note 14 at 125.

¹²⁴ Consumer protection laws tend to alleviate evidentiary requirements in favour of consumers. For example, the parol evidence rule often does not apply to consumer contracts: see *supra* note 18. In a US context, See generally Horovitz, *supra* note 43 at 140-143.

¹²⁵ When such jurisdictions explicitly provide such regimes of protection. For instance, this is the case under the *OCPA*, *supra* note 10; *MCPA*, *supra* note 83; *AFTA*, *supra* note 83; Business Practices and Consumer Protection Act, SBC 2004 c.2 [*BCBPCPA*], *SCPA*, *supra* note 3. This is also the case of the European Union, under *Directive 2011/83/EU*, *supra* note 32, and under EC, *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, [1993]OJ L 95/04 at 29 [*Directive 93/13/EEC*] which seeks to approximate the laws of the European Union member states with respect to non-negotiated contracts with consumers (article 1). This is also the case in France under the *Code de la Consommation*, and in the United Kingdom pursuant to Consumer Protection (Distance Selling) Regulation 2000 – SI 2000/2334 and pursuant to the *Unfair Terms in Consumer Contracts Regulations 1999*.

possession). In most jurisdictions, the said implied obligations do not apply to services,¹²⁶ leaving any applicable claims and remedies against a defective service to the common law.¹²⁷ In others, a different statutory implied obligation applies to services, requiring, for instance, that the services are deemed to be of a “reasonably acceptable quality.”¹²⁸ In transactions involving both goods and services, the “substantiality test” or “essence of the transaction test” indirectly allows the implied obligations to apply to services with necessary modifications, where the sale of goods prevails over the provision of services. The line of argument in Québec’s civil law jurisdiction under which services are “incorporeal movable property” and are therefore subject to consumer-protection-implied obligations applicable to goods would engender the same effect.¹²⁹

The unclear delineation between “goods” and “services” shares similarities with the *tangible v. intangible* dichotomy discussed above.¹³⁰ In Canada and the other jurisdictions examined here, while the definitions of “goods” generally refer to (tangible) “chattels personal,” “personal property,” or, in civil law jurisdictions, “movable property,”¹³¹ and often exclude “things in action,”¹³² services are

¹²⁶ This is the case under of *QCPA*, *supra* note 3, art 36-38, although the statutory warranty of correspondence with the description applies equally to goods and services: *ibid*, at art. 40. This is also the case under the *MCPA*, *supra* note 83; *AFTA*, *supra* note 83; *BCSGA*, *supra* note 10; *SCPA*, *supra* note 3, and *NBCPWL*, *supra* note 83; *US UCC*, *supra* note 23, applies only to goods: see *supra* note 27; *Directive 1999/44/EC*, *supra* note 5, also only applies to goods.

¹²⁷ See *supra* note 20.

¹²⁸ Statutory implied warranties as adapted in the case of the provision of services have been introduced in some jurisdictions. For example under the *OCPA*, *supra* note 10, s 9(1), the implied warranty applicable to services is that the services are of a “reasonably acceptable quality”. See also *MCPA*, *supra* note 83, s 58(6), which provides a non-mandatory implied warranty, “that the services sold shall be provided in a satisfactory manner”; *UKSGSA*, *supra* note 5, s 13 provides that “supplier will carry out the service with reasonable care and skill.”

¹²⁹ This is what L’Heureux, *supra* note 1 at 64-65, argues with respect to the *QCPA*, *supra* note 3.

¹³⁰ See Part II A of this chapter.

¹³¹ *QCPA*, *supra* note 3, art 1(d) defines goods as “any movable property”, which is defined in art 905 CCQ, as “Things which can be moved either by themselves or by an extrinsic force”. Art 907 CCQ states that all other property, if not qualified by law is movable. Thus the definition of goods is broad and would include incorporeal property (art 899 CCQ). In France, *Code de la Consommation*, art. L211 provides that the provisions dealing with warranties of conformity apply to movable, corporeal property. Other articles of the *Code de la Consommation*, for instance, the ones dealing with information disclosure requirements (L111-1ff) and the ones dealing with unfair commercial practices (L120-1ff) refer to “property” (“biens”) which is not defined, and would thus include movable and immovable property: CcF, art 516, unless specifically limited in the specific provision of the *Code de la Consommation*.

¹³² *OSGA*, *supra* note 10, s. 1(1) defines goods as “chattels personal” other than “things in action”, which dictates the scope of application of implied obligations in consumer contracts: *OCPA*, *supra* note 10, s 9 (2) and (3). *OCPA*, *supra* note 10, s 1, has a broader definition of goods as “any type of property” which would apply to other consumer protection obligations under the *OCPA*, *ibid*. See also *BCSGA*, *supra* note 10, s 1 (a); see also the *ASGA*, *supra* note 83, s 1(h) and *AFTA*, *supra* note 83, s 1(1) (e). Certain definitions refer

rarely defined and when they are, not in a manner that elucidates their nature and scope.¹³³ The Statute of Frauds' formality requirements, which require that certain contracts be in writing to be enforceable, have traditionally only applied to the sale of goods and not to the provision of services.¹³⁴ This has, at times, led courts to make artificial distinctions between of "goods" and "services,"¹³⁵ making the distinction between the two concepts even more confusing.

Property law and theory shed some light on the distinction between goods and services in sale of goods and consumer law. Analogies can also be drawn with the requirement of fixation for works to be protected under copyright law.¹³⁶ Property is foundational to sale of goods and consumer protection laws, with the concept of sale traditionally embedding transfer of title.¹³⁷ Eligible candidates to a sale need to possess the characteristics that make them capable of "transfer of ownership." The classification that singles out tangibles from intangibles has been borrowed from property law as a

to "tangible" personal property: *MCPA*, *supra* note 83, s 1(1); *NBCPWL*, *supra* note 83, s 1(1); *Directive 1999/44/EC*, *supra* note 5, art. 1 (2) b) defines goods as any "tangible" movable item, with some limited exceptions. *US UCC*, *supra* note 23, § 2-103 (k) defines goods as "all things that are movable at the time of identification to a contract for sale", and includes "manufactured goods", but excludes information and "choses in action." The *UKSGA* *supra* note 5, s 61 defines "goods" as including all "personal chattels, excluding choses in action and money".

¹³³ For example *BCBPCA*, *supra* note 125, s. 1(1), defines services as: "services, whether or not the services are together with or separate from goods, and includes a membership in a club or organization". *AFTA*, *supra* note 83, S. 1(1) k, defines services as "...any service offered or provided primarily for personal, family or household purposes" and includes specific examples. *SCPA*, *supra* note 3, s 3(f), defines services as: "services ordinarily provided for personal, family or household purposes that have been or may be sold, leased or otherwise provided by a supplier to a consumer."

¹³⁴ In a sale of goods context, Statute of Frauds impose that contracts for the sale of goods above a certain amount be in writing for contracts to be enforceable. For example, the Statute of Frauds requirements have been codified in the *US UCC*, *supra* note 23, § 2-201 which imposes such formal requirement for contracts of \$5,000 or more. This requirement was abolished in some provinces of Canada (e.g. British Columbia: Statute Law Amendment Act, SBC 1958, c. 52, s. 17). This requirement was abolished in the UK by the repeal of s. 4 of the Sale of Goods Act of 1893 through the *Law Reform Enforcement of Contracts Act*, 1954, 2 & 3 Eliz. 11, c. 34, s. 21.

¹³⁵ For example see one leading case on the distinction between skill and labour and materials: *Robinson v Graves*, *supra* note 84, where it was held that the commissioning of a painting by oral agreement, the order of which was later annulled by the defendant, was a contract for skill and labour and not material. Therefore the statute of frauds rule by which contracts of a certain value needed to be in writing to be enforceable was not applicable. It is debatable that this was not a contract for materials. See also generally, Michael Bridge (Gen. ed.) *Benjamin's Sale of Goods*, 8th ed. (London: Sweet & Maxwell 2010) [Benjamin's Sale of Goods 8th ed.] at para 1-041.

¹³⁶ The description and application of the concept of "fixation" is further described below in this Part.

¹³⁷ For a discussion on the various potential meanings of "property" and "transfer of property" when employed in a sale of goods law framework. See Fridman, *supra* note 12, at 61ff; Atiyah & Adams, *supra* note 12, at Chapter 19.

means to exclude the latter from the application of sale of good laws.¹³⁸

Courts and commentators resort, from time to time, to the connection between property and sale of goods and consumer protection regimes to characterize a transaction as goods or services,¹³⁹ and borrow from the distinction between the tangible and intangible dichotomy in property law. For instance, the requirement of “tradability” has been combined with the one of “tangibility” to provide various filters leading toward the differentiation between goods and services.¹⁴⁰ The centrality of movability to assert the nature of goods, as opposed to “tangibility,” has already been discussed.¹⁴¹ Movability implies something “to take with oneself”¹⁴² and is the underlying requirement for the transfer of ownership as another means to distinguish a good from a service.¹⁴³

One key differentiator between goods and services resides in the faculty of ownership. As Fiona Smith and Lorna Woods observe, in the context of the World Trade Organization and EU, on this important classification:

On one level, the notion of property transfer appears inherently bound up with goods and not services because the acquisition of ownership from the producer is predicated on the transfer of possession of the product. Such possession entails “actual holding or having something as one’s own,” implying either physical existence of the thing possessed or the right to exercise control over the product.¹⁴⁴

Ownership is an “organizing idea” that is central to James Harris’s theory of property and justice: “ownership powers of control and transmission all involve capacity to create relations with others by virtue of a person’s ownership of something. Powers to control uses by others are as open-ended a class as are ownership use-privileges.”¹⁴⁵ Thus the essence of ownership is to embed open-ended use

¹³⁸ This is illustrated by the exclusion of “choses in action” or “things in action” or from the requirement that goods be “tangible” in the various definitions of goods in sale of goods and consumer protection law statutes or directives: see *supra* note 83.

¹³⁹ For example see *Advent Systems*, *supra* note 87; Horovitz, *supra* note 43; Rodau, *supra* note 50.

¹⁴⁰ Smith & Woods, *supra* note 38 at 60. As the authors explain: “Tradability and tangibility serve as a series of filters, containing both objective and subjective criteria. Tradability first acts to distinguish between products that are bought and sold and which therefore fall within the economic sphere addressed by the rules in bodies such as the WTO and the European Union..... Tangibility then constitutes a rebuttable presumption that intangible items are services while tangible items constitute goods. The product’s function, in combination with tradability, then acts as the determining factor.”

¹⁴¹ More particularly, see Part II A of this chapter.

¹⁴² As in the concept of “personal” property.

¹⁴³ See Smith & Woods, *supra* note 38 at 45.

¹⁴⁴ *Ibid* at 45.

¹⁴⁵ Harris, *supra* note 7 at 67.

and some control powers in a resource.¹⁴⁶ Possessory rights of indefinite duration also share the attributes of ownership.¹⁴⁷

To exercise power and control requires a finite quality that has been fixed in time, as opposed to a sequential event occurring in time that is not capable of fixation (that can be more readily associated with a service). The fact that a musical recording or a film has a sequential quality (i.e., a variable duration during which the work is played) does not exclude it from having a finite quality if it has been fixed as a whole in time in one medium available to the consumer.

An interesting parallel can be made between the determinant factors to distinguish goods from services and the requirement of “fixation” in copyright law. For a work to be protected by copyright, it needs to be “fixed”¹⁴⁸ as opposed to an ephemeral expression (such as an unrecorded *a cappella* performance) that is devoid of stability, repeatability, and of *consumption*.¹⁴⁹ The requirement of “fixation” in copyright law and of “tangible good” in sale of goods law (and consumer law) share a common preoccupation, and that is, whether we are witnessing an identifiable and *perceptible* product or not, that persists beyond its moment of creation or interpretation. A musical recording or a film is “fixed” in a digital copy. From the perspective of consumers, a musical recording or film captured in a copy made available to them gives them the open-ended ability to enjoy the work autonomously. The streaming of a film (while it originates from a fixed copy from the perspective of copyright holders) does not give the same autonomous capacity to consumers. After the streaming, the representation is lost in time and in space without them retaining the possession of a fixed copy.

¹⁴⁶ *Ibid.* at 5. The application of Harris’s theory of property and justice to the nature of copyright and copies of copyright works is discussed in Chapter 5 Part IV and in Chapter 6 Part II B. For instance, the three components that are present at varying degrees in all forms of property on the ownership spectrum are : (1) a juridical relation between a person and a resource; (2) privileges and powers which they comprise are open ended (3) they authorize self-seekingness on the part of the individual or group to whom they belong: *Ibid.*

¹⁴⁷ *Ibid.* at 34. This is particularly important in the context of the commercial practice whereby copies of copyright works are licensed for an indefinite duration and not falling under a contract of sale, properly so called.

¹⁴⁸ “Fixation” is not defined in the *CCA*, *supra* note 75. *CCA*, s 2, requires explicitly that computer programs, dramatic works and sound recordings be fixed in order to fall under the application of the *CCA*, *Ibid.* Leading cases on the requirement of fixation include: *Galerie d’art du Petit Champlain inc. v Théberge*, 2002 SCC 34, at para 145: “ (...) The work is, so to speak, the physical outcome of the creative process. Fixation of the work in a medium is a condition *sine qua non* of the production of a work.”; *Canadian Admiral Corporation, LTD. v Rediffusion, Inc.* (1954) (Ex. Ct); *Gould Estate v Stoddart Publishing Co.* (1996) 30 O.R. (3d) 520 (Ont. Ct. Gen. Div.).

¹⁴⁹ In this particular case, one can add that it is lost in time and in space.

The power-control characteristics of ownership of goods lead to the same conclusion. While the broadcast or streaming of a film or a musical recording cannot be owned by the consumer viewing or listening to it (which makes it fall under the category of “services”), the copy of the same film or musical recording downloaded from a service provider can be the subject of ownership (which makes it fall under the category of “goods”). While consumers can have a transferable interest in a subscription to a service, e.g., Internet access services, they do not own or possess the service as a whole. They have a right to access the service. Thus, the faculty of ownership of a resource and, with it, the ability to exercise *prima facie* open-ended autonomous control and power over it (i.e., no dependence on any other external intervention that is not one’s own or dictated by one’s own) are helpful attributes to distinguish goods from services.

The increased presence of services through which copyright works are experienced by consumers and the blurry line between goods and services lead to important questions on the regulation of information products. One of them is the extent to which different treatments for goods and services, e.g., with respect to the levels of implied obligations that apply, are warranted.

The rationale for the different regulations for goods and for services is not always entirely clear.¹⁵⁰ Looking at goods and services from the perspective of the faculty to own the resource or not provides the justifications for regulating services differently from goods in some but not all cases. It is justified that the implied obligations of title, quiet possession, and freedom from encumbrances can apply primarily to goods where a transfer of title and possession occurs, and unless these implied

¹⁵⁰ As noted in a paper prepared by the Institute of Law Research and Reform, University of Alberta, “Statute of Frauds” Background paper no. 2, (1979) at 83, on the reason for distinguishing goods from services for the application of the Statute of Frauds requirement in (what was then) s. 7 of the *Alberta Sale of Goods Act*, that: “Precisely what attributes distinguish a contract for the sale of goods from one for the supply of skill and labour is, in reality, a metaphysical question”, pointing to the inconsistent qualification of goods and services in earlier UK case law: *Ibid.* at 83-85. The Law Commission’s Report On Implied Terms in Contracts for the Supply of Goods (Law Com. No. 95, HMSO, 1979) online at http://www.google.ca/search?sourceid=navclient&ie=UTF-8&rlz=1T4ADBF_enCA275CA275&q=the+law+commission%27s+report+on+implied+terms+in+contract%27s, at paras 56ff. describes the traditional treatment of “Contracts of work and materials” as distinct from contracts for the sale of goods, without providing the rationale for the differential treatment. While making a recommendation that such contracts should be subject to the same implied terms as regards sales of goods for the “materials” portion, it refrained from making any recommendation on the treatment of the “work” or services portion (*ibid.*, at para 63).

obligations are subject to important modifications for services.¹⁵¹ A different application of the implied obligations of quality and fitness for purpose may also be justified on the basis of practical and conceptual considerations.¹⁵² Obviously, if the service does not involve the delivery of a “thing,” but the performance of a human action that is finite in time, an implied obligation of quality or fitness for use of a finished product cannot apply. Rather, the implied obligation that purports to the *manner by which* the action is performed is the appropriate legal framework. There is an element of uncertainty in the delivery of a service that involves real-time human action that gives rise to different levels of expectations that are not present to the same extent in the delivery of finished goods.¹⁵³ This can explain the different liability regimes that apply to implied obligations for goods (i.e., strict liability regimes) as opposed to services (i.e., fault-based liability regimes).¹⁵⁴

The different levels of application of implied obligations of quality and fitness for use to goods and services seem less justified with respect to automated continuous services. While the concerns on the applicable level of implied obligations, based on the distinction between goods and services may remain in the case of specific forms of artisanal manual services including the delivery of highly customized products,¹⁵⁵ these concerns are not present in largely automated environments of continuous services, including Internet service access and other related services that facilitate the online distribution of digital copies of copyright works. The uncertainty that surrounds the outcome of a future human action in an artisanal type of labour or the lack of control that can be exerted to predict the end results of the human labour are not present. In the case of goods, the implied obligations of

¹⁵¹ The conclusion from the present discussion is that while a good can be owned or possessed, a service cannot. Therefore there can be no expectation of “quiet possession”, unless it is given a very broad meaning or that it is adjusted to the provision of services, where appropriate. Obligations regarding clearance of title would not apply to services which do not involve any ownership transfer.

¹⁵² Concepts of property and ownership are at the heart of the practical and conceptual distinctions between goods and services as this is discussed further below in Part II B of this chapter.

¹⁵³ A good is a finished product at the time that it is sold. On that basis, certain levels of expectations can be present (i.e. that it would be verified, tested as to meet certain uniform standards before they are delivered). See Bradgate, *supra* note 22 at 27-28.

¹⁵⁴ I.e. consumer protection obligations imposing minimum standards of quality and of fitness for purpose are generally based on strict liability regimes (see the discussion in Chapter 9 Part II) as opposed to services which in many of the jurisdictions applying a differential treatment, offer protection on a fault-based regime: for example *UKSGSA*, *supra* note 5, s. 13, provides that “supplier will carry out the service with reasonable care and skill.”

¹⁵⁵ E.g. the expectations may be different than with respect to standardized products. In such cases, the actual end result is less certain which can justify a regime of liability that would be based on the craft man or worker applying diligence and care.

fitness for purpose apply to the finite end product, and in the case of services, the quality and fitness for use implied obligations could apply to the level at which it is being offered or supplied over the relevant period of time.¹⁵⁶ For instance, levels of quality or fitness for use could apply to a streaming service of films or musical recordings or to an online storage service. At present, implied obligations of services typically require that they be provided in a workman-like manner or impose similar requirements.¹⁵⁷ As I argued above, a reasoned approach to the distinction between goods and services is critical for the adequate regulation of information products distributed online. By the same token, the evolution of the services that are provided, including an increase in automated services, call for a revision of the traditional different treatment of goods and services, *inter alia*, in the application of implied obligations.

To sum up, there is a need for a more coherent approach to the characterization of goods and services. The faculty of the ownership of goods, as opposed to services, needs to be emphasized. With it, the quality of movability and separateness that is a precondition of the ownership of personal property entails the open-ended autonomous and independent faculty to use and *consume* the good, with no reliance on any external forces or operations, which is not the case for services. The adequate regulation of information products requires rethinking the different levels of protection (e.g., implied obligations of quality, fitness, and quiet possession) that still prevail for goods and services. For instance, the automated and highly standardized level of services related to information products mandate similar levels of protection as are the case with goods (strict liability v. fault-based liability).

The distinction between a sale and a licence is another area that leads to similar confusion as the distinction between tangible v. intangible and goods v. services. In some cases, the confusion spills over to these distinctions. I explore next the possible root causes of the confusion, as well as avenues of solution.

¹⁵⁶ A custom term of the industry in software license and maintenance agreements is to refer to “standards of service levels” or “service level agreements.”

¹⁵⁷ See *supra* note 128.

C. Sale v. licence

The qualification of the legal transaction through which copies of copyright works are made accessible is highly relevant to the application of consumer law implied obligations.¹⁵⁸ In some jurisdictions, the absence of a “sale” will preclude the application of sale of goods and consumer protection law statutes, leaving any protection to the potential application of other statutes or to the application of similar implied obligations under the common law.¹⁵⁹

The question of “goods” and the nature of the legal transaction through which they are made accessible are related, but at the same time they address distinct issues that should be treated independently from each other.¹⁶⁰ While the restriction in scope of sale of goods and consumer protection law implied obligations to “sale of goods” exists in some jurisdictions, it varies in

¹⁵⁸ In some jurisdictions, the requirement of the sale of a good is relevant to the application of implied obligations (e.g. quality, fitness for purpose, title and quiet possession). It is generally not relevant for the application of information disclosure requirements and for the application of provisions prohibiting unfair terms. See the discussion above in Part II A and B of this chapter.

¹⁵⁹ See *supra* note 20. In the UK, while the implied obligations under the *UKSGA*, *supra* note 5, would not apply in the absence of a sale, the implied obligations of the *UKSGA*, *supra* note 5 may apply if the transaction falls within the scope of this Act. For example see: *SAM Business Systems Ltd v Hedley & Co* 2002 WL 31784544 (QB) and *Jonathan Wren & Co Ltd v Microdec Plc* 1999 WL 1953326 (HC, TTC) where the court held that the *UKSGA*, *supra* note 5 applied to computer systems.

¹⁶⁰ The *UKSGA*, *supra* note 5, illustrates this distinction. It imposes obligations to suppliers with respect to goods that are supplied through various forms of contracts other than a sale, including implied obligations that are similar to the ones available under the *UKSGA*, *supra* note 5.

Canada¹⁶¹ and elsewhere.¹⁶² Goods can be made accessible through various forms of contracts that in some jurisdictions can also benefit from the protection of implied obligations.¹⁶³

There is a tendency to characterize the nature of goods and the nature of the legal transaction by referencing to each other. This is particularly true in the significance that courts have attributed to the “hand-to-hand” exchange of a physical medium supporting the copy of a copyright work to assert that goods were the objects of the transaction and to conclude by extrapolation that they were sold even in the face of terms to the contrary.¹⁶⁴ It is also true in the confusion that arises between the licence granted to consumers to the exclusive intellectual property rights of the copyright holder and the transaction that is taking place with respect to the copy itself.¹⁶⁵ As a result, the struggles examined so far to define “goods” reverberate on the determination of the nature of the transaction as a sale or a licence and need not be repeated here.¹⁶⁶

The proper determination of the legal transaction through which copies of copyright works are made accessible is becoming eminently complex with the proliferation of non-negotiated standard terms and conditions and the varying weights that courts are willing to give to those terms in consumer

¹⁶¹ For example In Manitoba and Saskatchewan, the implied obligations of quality, fitness for purpose and quiet possession are restricted to “every retail sale of goods and in every retail hire-purchase of goods”: *MCPA*, *supra* note 83 s. 48(1) or “to consumer products sold”: *SCPA*, *supra* note 3, s 48. In Québec and New Brunswick, the implied obligations of fitness for purpose and quality and durability apply more broadly to “goods forming the object of a contract”: *QCPA*, *supra* note 3, art 37-40 (while the implied obligation related to title and quiet possession (“garantie contre l’éviction”) applies to contracts which involve the transfer of ownership: *ibid.* at art 36) or “for the sale or supply of a consumer product”: *NBCPWL*, *supra* note 83, s. 10(1) (*ditto* for the implied obligation of quiet possession with particular provision for lease-hire transactions: *ibid.* s 8(1) and 8(2)). In Ontario, while the definitions of “sale” in the *OSGA*, *supra* note 10, is broad, the sale of goods framework as opposed to the one of consumer protection suggests transactions involving the transfer of title: *OSGA*, *supra* note 10, s. 1(1). The Nova Scotia *Consumer Protection Act* RSNS 1989 c. 92 [*NSCPA*] at S. 26 (1) provides with respect to the application of implied obligations “In this Section and Section 27, “consumer sale” means a contract of sale of goods or services including an agreement of sale as well as a sale and a conditional sale of goods made in the ordinary course of business to a purchaser for his consumption or use but does not include a sale.”

¹⁶² *UKSGA*, *supra* note 5, limits its scope to sale of goods but the *UKSGSA*, *supra* note 5, applies to a broader range of transactions for the supply of goods.

¹⁶³ *Supra* note 161 and 162.

¹⁶⁴ The significance placed on the physical medium exchanged hand to hand to determine the nature of the object of the transaction is discussed in Part II A of this chapter.

¹⁶⁵ This confusion is discussed in Part II A of this chapter.

¹⁶⁶ This is due in part because of the legal requirements that necessitate a distinction between goods and services (as discussed in Part II A and B of this chapter).

contracts, let alone issues around their enforceability.¹⁶⁷ The absence of an embedding medium for the digital copy, such as a CD or a DVD, facilitates a growing commercial practice under which copyright holders unilaterally decide that there is no sale in the copy of the copyright work, a practice that is far less common in the physical hand-to-hand exchange scenarios of books, music CDs, or film DVDs, which have long been considered as sales of goods.¹⁶⁸

Licence agreements are a common form of contract for the commercialization of copies of copyright works and other forms of intellectual property. They typically confirm that the transfer of a copy does not entail the transfer of the copyrights that pertain to the work and set out the acts that copyright holders allow or forbid consumers to perform on their works. In some cases, a licence agreement will extend to the copy of the work that would otherwise be sold, by specifying that consumers enjoy a mere right (licence) to use the copy and that they cannot transfer their rights to their copies. Copyright holders who restrict the transfer of the copy are technically stepping out of their reserved rights under copyright (except for their exclusive rental rights that apply only to specific forms of copyright works) and extending the powers conferred by copyright through contract.

The increased commercial practice of non-negotiated standard end-user agreements seems to bring more nebulousity than certainty, especially for consumers, when compared to transactions of copies of copyright works that are not accompanied by standard non-negotiated licences. This commercial practice exemplifies the exercise of copyright holders' contractual freedom as it is specifically contemplated by copyright law.¹⁶⁹ The increased commercial practice of non-negotiated standard end-user agreements occurs in the midst of various interdependent legal structures, the boundaries of

¹⁶⁷ The enforceability of non-negotiated standard terms and conditions, including "click-wrap," "shrink-wrap" or "browse wrap" license agreements, varies across jurisdictions: see the report that looks at the regulation of digital content in 11 countries mostly European countries, including the UK and France, and also the US, prepared by Loos & al., *supra* note 14 at 65ff. In a US context, the various challenges that shrink-wrap agreements pose to traditional contract law are discussed *inter alia* in N.S. Kim, "Clicking and Cringing" (2007) 43 Oregon Law Review 797. In a consumer protection law analysis, the contract can be subject to "external" influences that alter its terms, *a fortiori* when such contract is not negotiated, which can include a finding that some or all of its terms are not enforceable. For a discussion on the enforceability of click-wrap agreements in a European Union context, see Rott, *supra* note 30 at 447.

¹⁶⁸ The transfer of CDs, DVDs, and cassettes are commonly treated as sales of chattels movables, unless they are provided under a specific rental agreement. By contrast, the software industry has for some time adopted the commercial practice to licence (and not sell) copies of software even when they were supplied through the physical transfer of a CD or DVD. The U.S. Court of Appeals, Third Circuit briefly discussed the historical context of software licenses in *Step-Saver Data Systems, Inc. v Wyse Technology*, 939 F.2d 91, 96 n. 7 (3d Cir.1991), more specifically at footnote 7.

¹⁶⁹ CCA, *supra* note 75, s 13(4).

which are uncertain: the exclusive property rights conferred by copyright law, the ownership or possessory rights of consumers and other users to the copy, the existence of limitations to copyright holders' exclusive rights (qualified as rights or exceptions to copyright infringement), the creation of additional rights for copyright holders through the introduction of technological protection measures, and, last but not least, their effect under contract and consumer protection laws.

No licence for the exclusive rights of copyright holders is required for transactions in copies of copyright works, unless copyright holders want to increase consumers' rights (e.g., reproduction, telecommunication to the public, etc.) that are otherwise under their exclusive domain, or to limit consumers' rights more than they already are under copyright law (e.g., limitations as to time or territory could fall in that category). While non-negotiated standard end-user agreements are increasingly becoming the norm in an online environment,¹⁷⁰ it is only in these two instances that they are necessary. With respect to the rights to the copy, no written contract is required either, and, a sale or the equivalent of a rental of personal property would occur.

The superfluous recourse to licences in commercial transactions involving copies of copyright works has been noted before.¹⁷¹ It points to the paradox of information disclosure, a particularly praised legal tool of consumer law.¹⁷² On the one hand, the supply of information to consumers through detailed licence terms can be viewed as meritorious, even essential to efficient and enlightened decision-making.¹⁷³ On the other, non-negotiated standard end-user agreements for copies of copyright works may raise more questions than they resolve, in contrast with a transaction with no non-negotiated

¹⁷⁰ The review of a sample of online standard terms and conditions for the distribution of copies of books, musical recordings and films illustrates this tendency: see the discussion in Chapter 3 Part III C.

¹⁷¹ In a US context, see *Step-Saver Data Systems, Inc. v Wyse Technology*, *supra* note 168, where the United State Court of Appeals, Third Circuit, reviewed the historical background behind the practice of software licensing and the fact that the practice was initially justified *inter alia* to avoid the application of the first sale doctrine, and more particularly the case of subsequent rentals of copies, which prior to amendments brought to the first sale doctrine provisions of the copyright act, were arguably allowed. Now that these reasons were removed, the Court found the practice of licensing to be "largely anachronistic". Other courts have pointed to the initial uncertainties around the legal protection of software which have since been removed as protected as a literary works: *Softman Products Company, LLC, v Adobe Systems Inc.*, 171 F.Supp.2d 1075, 45 UCC Rep.Serv.2d 945 (CD Cal. 2001) at para 11. See Bradgate, *supra* note 22 at 37: In absence of a licence permitting acts that are otherwise reserved to copyright holders, the doctrine of implied licence could apply to allow the proper use of the copy of the copyright work, e.g., a software.

¹⁷² The information disclosure requirements are discussed in Chapter 9 Part IV.

¹⁷³ I review the theoretical justifications supporting information disclosure requirements in consumer transactions in Chapter 10.

standard end-user agreement at all, as it has been traditionally the case with respect to the sale of books, CDs, and DVDs.¹⁷⁴

The outcome of the legal characterization of the increasingly prevailing commercial practice of licensing in the realm of online distribution remains uncertain for various reasons. The variation of statutory definitions of “sale” and “lease”, as well as their interpretation,¹⁷⁵ can give rise to important discrepancies between the Canadian provinces and territories,¹⁷⁶ and the other jurisdictions examined here,¹⁷⁷ on the application of sale of goods and consumer law implied obligations to licences of copies of copyright works. There is an ongoing debate on the determination of software licence agreements as ultimately falling under sale, rental, or *sui generis* contracts.¹⁷⁸ As in the determination of the

¹⁷⁴ The questions they raise are discussed through the application of four specific scenarios in Chapter 11.

¹⁷⁵ In a US context, *US UCC*, *supra* note 23, § 2-106 (1) defines “sale”: “consists in the passing of title from the seller to the buyer for a price (Section 2-401)”. In some states, the definition of sale has been expanded to any “transaction in goods”: see *infra* note 176. *US UCC*, article 2A applies to leases and includes similar implied obligations as for contracts of sale. *US UCC*, *supra* note 23, § 2A-103 (j), defines lease: “means a transfer of the right to possession and use of goods for a term in return for consideration...”. Braucher, *supra* note 12 at 275-276 notes “Article 2 defines a sale in terms of the passing of title for a price, but the reference to title is not meant to impose a formal, non-functional approach. Article 2 recognizes that reservation of title is a legal strategy that should be limited in its effect. A title retention strategy that had been attempted at the time of Article 2’s enactment was as a way to have goods sold serve as collateral. Article 2 limited the effect of such a provision to a security interest.”

¹⁷⁶ For example In Manitoba and Saskatchewan, the implied obligations of quality, fitness for purpose and quiet possession are restricted to “every retail sale of goods and in every retail hire-purchase of goods”: *MCPA*, *supra* note 83, s. 48(1) or “to consumer products sold”: *SCPA*, *supra* note 3, s. 48). In Québec and New Brunswick, the implied obligations of fitness for purpose and quality and durability apply more broadly to “goods forming the object of a contract”: *QCPA*, *supra* note 3, art. 37-40 (while the implied obligation related to title and quiet possession (“garantie contre l’éviction”) applies to contracts which involve the transfer of ownership: *ibid.* at art. 36) or “for the sale or supply of a consumer product”: *NBCPWL*, *supra* note 83, s. 10(1) (*ditto* for implied obligation of quiet possession with particular provision for lease-hire transactions: *ibid.* s. 8(1) and 8(2)). In Ontario, while the definitions of “sale” in the Sale of Goods Act is broad, the sale of goods framework as opposed to consumer protection suggests transactions involving the transfer of title: *OSGA*, *supra* note 10, s. 1(1). *NSCPA*, *supra* note 161, s. 26 (1) provides with respect to the application of implied obligations “In this Section and Section 27, “consumer sale” means a contract of sale of goods or services including an agreement of sale as well as a sale and a conditional sale of goods made in the ordinary course of business to a purchaser for his consumption or use but does not include a sale.”

¹⁷⁷ For example, the *US UCC*, *supra* note 23, State provisions have been adapted to refer to “transaction in goods” and not “sale”, which would include licence agreements. See for example: *Colonial Life Ins. Co. of America v Electronic Data Systems Corp.*, *supra* note 119, where the Court, citing the New Hampshire Supreme Court in: *Xerox Corp. v Hawkes*, 124 N.H. 610, 615, 475 A.2d 7, 9 (1984) “[t]he use of the term ‘transaction’ rather than ‘sale’ in UCC § 2-202 makes it clear that Article 2 is not to be confined to those transactions in which there is a ‘sale,’ that is a transfer of title.” The same rationale applies in the State of New York: *Architectronics, Inc. v ControlSystems*, *supra* note 84. See also: Horovitz, *supra* note 43 at 139-140.

¹⁷⁸ This is particularly true in France where there is a debate on how to define software licences, i.e., as amounting to a sales contract, a rental agreement or a *sui generis* contract: Loos & al., *supra* note 14 at 33.

nature of copies of copyright works, there tends to be confusion between copyright holders' exclusive rights, which remain their property, and the ownership in the copy of the copyright work.¹⁷⁹ Because copyright holders do not transfer their property in the copyright, the assumption is made, in absence of a physical supporting tangible medium exchanged from hand-to-hand, that the licence agreement cannot embed a transfer of ownership (sale) of the copy of the copyright work.¹⁸⁰

In determining that the contract is a sale or a licence, courts, especially in the US, will sometimes look beyond the suppliers' qualification of the transaction (e.g., as a licence) and look to the substance and effects of the agreement.¹⁸¹ Although there is no consistency on that matter, US courts have at times determined as a "sale" a transaction described as a licence that involves a single payment and

In *Beta Computers(Europe) Ltd v Adobe Systems (Europe) Ltd*, *supra* note 49, Lord Penrose qualified licence agreements as *sui generis* agreements. See also Dusollier 2007, *supra* note 114 at 411-414 who reviews the various elements contained in licence agreements which may or may not involve sale in the commercial copy of the copyright work. The author notes that there is confusion around what licence agreements cover: i.e., confusion between the exploitation of the exclusive rights of copyright holders and the delivery of the services involved and between what may constitute a sale and a service.

¹⁷⁹ See for example Bradgate, *supra* note 22 at 37.

¹⁸⁰ *Ibid.*

¹⁸¹ For a recent decision on the treatment of this practice as a licence or as a sale. See: *Vernor v Autodesk, Inc.*, F.3d 2010 WL 3516435 (9th Cir. 2010) where the U.S. Court of Appeals, Ninth Circuit gave more weight to the terms used by software licensor than in previous judgments. The Court held that the applicable test to determine the nature of the transaction was: "whether the copyright owner specifies that a user is granted a license. Second, we consider whether the copyright owner significantly restricts the user's ability to transfer the software. Finally, we consider whether the copyright owner imposes notable use restrictions." The reasoning applied by the U.S. District Court of California in: *Softman Products Company, LLC, v Adobe Systems Inc.*, *supra* note 171 at para 14, is a good illustration of how courts have qualified the transaction, regardless of suppliers labelling the contract as a licence: "the following factors require a finding that distributing software under licenses transfers individual copy ownership: temporally unlimited possession, absence of time limits on copy possession, pricing and payment schemes that are unitary not serial, licenses under which subsequent transfer is neither prohibited nor conditioned on obtaining the licensor's prior approval (only subject to a prohibition against rental and a requirement that any transfer be of the entity), and licenses under which the use restrictions' principal purpose is to protect intangible copyrightable subject matter, and not to preserve property interests in individual program copies". The Court relied on the comments made by Professor Nimmer: "Ownership of a copy should be determined based on the actual character, rather than the label, of the transaction by which the user obtained possession. Merely labelling a transaction as a lease or license does not control. If a transaction involves a single payment giving the buyer an unlimited period in which it has a right to possession, the transaction is a sale. In this situation, the buyer owns the copy regardless of the label the parties use for the contract. Course of dealing and trade usage may be relevant, since they establish the expectations and intent of the parties. The pertinent issue is whether, as in a lease, the user may be required to return the copy to the vendor after the expiration of a particular period. If not, the transaction conveyed not only possession, but also transferred ownership of the copy". On the distinction between sales and licences under US copyright law, see also *F.B.T. Productions, LLC v Aftermath Records*, 621 F.3d 958 (9th Cir 2010). See also test to establish ownership in copies regarding rights of copy owners of computer programs to make limited modifications under 17 USC § 117(a) (1): *Krause v Titleserv Inc.*, 402 F.3d 119 (2nd Cir 2005); *Zilyen Inc., v Rubber Manufacturers Association*, F. Supp (2d) 2013 WL 1302012 (DDC).

that grants possession to the copy of the copyright work for an indefinite duration.¹⁸² As I discuss below in the context of copyright exhaustion, the Court of Justice of the European Union made a similar determination on the contracts at hand in *UsedSoft GmbH v. Oracle International Corp [UsedSoft]*.¹⁸³ On the one hand, the decision of courts to abide by the terms of the licence when determining the rights in copies of copyright works sometimes results from a confusion on the differences between the legal terms with respect to the intangible intellectual property rights and the legal terms with respect to the copy.¹⁸⁴ On the other hand, the resistance by courts to enforce the terms of the contract may well be explained by the application of the *numerus clausus* principle, by which there is a fixed and closed list of property interests recognized by law that should not be alterable by contract.¹⁸⁵ This would explain why courts have been at times reluctant to enforce licence agreements that restrict the transfer of copies while allowing their permanent use, which creates, in essence, a new form of property interest. It may also be explained by the fact that in doing so, copyright holders restrict by contract transfer rights in the copy that are outside the realm of their exclusive rights (but for some specific exclusive rental rights).

The increased commercial practice of (non-negotiated standard form) licence agreements and their characterization by courts as sale or licence with respect to the rights in the copy brings an additional layer of uncertainty in the application of sale of goods/consumer laws to copies of copyright works,¹⁸⁶ and as I discuss below, regarding the application of copyright exhaustion.¹⁸⁷

To sum up on how the uncertainty about the determination of commercial transactions as sales or licences can be addressed, first, the presence of a sale is not a condition *sine qua non* for the existence

¹⁸² *Ibid.*

¹⁸³ C-128/11, [2012] OJ C 287 at 10. In that case, the Court had to determine whether the transfer of ownership (sale) of the copy of the computer program had taken place or not which is a requirement of the application of exhaustion: see the discussion on that case in Part III of this chapter.

¹⁸⁴ Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, online loose-leaf resource (New York: Matthew Bender, 1978), at para 8.08 B 1 C. For a discussion on the distinction between sale and licence in US jurisprudence on the first sale doctrine, see Brian W. Carver, “Why License Agreements do not Control Copy Ownership: First Sales and Essential Copies” (2010) 25 Berkeley Tech. L.J. 1887. See also Aaron Perzanowski & Jason Schultz “Copyright Exhaustion and the Personal Use Dilemma” (2012) 96 Minn. L. Rev. 2067 at 2124-2129.

¹⁸⁵ I discuss the *numerus clausus* principle in Chapter 4 Part III, Chapter 5 Part IV C and in Chapter 7 Part IV.

¹⁸⁶ In France there is a debate on the nature of the contract involving a software supplied on a CD or similar medium: some argue it is a contract of sale, others argues it is a contract for hire and others that it is a *sui generis* contract: see Loos & al., *supra* note 14 at 33.

¹⁸⁷ See Part III of this chapter.

of goods and its absence should not be relied upon to determine that specific products are not goods: goods can be leased, hired, rented, etc. They do not lose their goods-like nature in the absence of a sale. Second, there is a distinction between licences to the intellectual property rights of the right holder in the work, which are either explicitly or impliedly part of commercial transactions involving copies of copyright works, and the licence or sale *to the copy* of the copyright work. In the latter case, copyright holders who restrict the transfer in the copy are technically stepping out of their reserved rights under copyright (except for rental rights that apply to specific forms of copyright works) and extending the powers conferred by copyright through contract. I argued in Chapter 7 that, through the application of the *numerus clausus* principle, any commercial transaction that in all material terms resembles a sale should be treated as such regardless of its appellation by copyright holders.¹⁸⁸ The Court of Justice of the European Union applied a similar reasoning in *UsedSoft*, as I discuss further below in relation to the application of copyright exhaustion.¹⁸⁹

The dichotomies between tangible and intangible, goods and services, and sale and licence are determinant of the qualification of goods under sale of goods and consumer law and, by ricochet, on the level of protection offered to purchasers under sale of goods and consumer law. I explore next the extent to which the analysis conducted here on these dichotomies can also help to lead to a better understanding of the application of copyright exhaustion, which is another important component of users' rights to copies of copyright works.

III. Parallels and implications with respect to exhaustion or the first sale doctrine

As I discussed in Chapter 3 and Chapter 7, the prevailing view is that international copyright law (as implemented by several national and regional jurisdictions) requires, for the exclusive right of distribution to apply and to be exhausted, the presence and transfer of a physical medium exchanged from hand-to-hand and that embeds the copyright work.¹⁹⁰ Under that view, the exclusive right of distribution and exhaustion would not apply to digital copies distributed online with no physical supporting media exchanged from hand-to-hand. I questioned the rationale behind the requirement of a physical object in which the copyright work is embedded.

¹⁸⁸ See the discussion on the *numerus clausus* principle in Chapter 7 Part IV.

¹⁸⁹ See Part III of this chapter.

¹⁹⁰ In particular, in Chapter 3 Part II F and in Chapter 7 Part IV.

There are noticeable similarities between the issues raised in the application of sale of goods and consumer law and of copyright exhaustion to digital copies of copyright works. Both bodies of law tend to require the presence of a supporting physical medium exchanged from hand-to-hand to determine the specific products as goods and for copyright exhaustion to apply. Copyright exhaustion only applies to copies that are lawfully transferred and not merely leased or licensed and does not apply to copyright works experienced through services. I argue here that the misunderstandings about the nature of digital copies under sale of goods and consumer law, arising from a misapplication of the three dichotomies explored above, i.e., (i) tangible v. intangible (ii) goods v. services, and (iii) sale v. licence, are present to some extent in the application of copyright exhaustion. The application of sale of goods and consumer law, and of copyright exhaustion all lean toward a potential shrinking of consumers' rights to digital copies of copyright works.

In the recent *UsedSoft* judgment, the Court of Justice of the European Union (Grand Chamber) was confronted at some level with the application of these three dichotomies.¹⁹¹ For the time being, the holding of the *UsedSoft* judgment may not have ramifications beyond the specific case of computer programs distributed online.¹⁹²

In *UsedSoft*, the Court of Justice of the European Union was seized with a reference to a preliminary ruling by the Bundesgerichtshof (Germany), that involved the question of whether exhaustion of the distribution right in article 4(2) of *Directive 2009/24/EC* applied to a lawful acquirer who had made the copy by downloading the computer program from the Internet to a data carrier. The outcome of that question was of significant importance to Oracle who distributed at the time 85 per cent of its computer programs through Internet downloads.¹⁹³ Article 4(2) of *Directive 2009/24/EC* provides:

¹⁹¹ *UsedSoft*, *supra* note 183. The three dichotomies are: the distinction between tangible and intangible, goods and services, sale and licence.

¹⁹² This case involved the interpretation of EC, *Council and Parliament Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs*, [2009] OJ L 111/16 [*Directive 2009/24/EC*], at art. 4 (1) (c). As the Court reiterated throughout its reasons, this directive is *lex specialis* in relation to *Directive 2001/29/EC*, *infra* note 194: *UsedSoft*, *supra* note 183, for instance at para 56. The wording of the exhaustion of the exclusive right of distribution in *Directive 2009/24/EC* which deals with the protection of computer programs differs from the one of *Directive 2001/29/EC* on the harmonization of copyright law within the EU. The relevant provisions of each directive are summarized by the Court in *UsedSoft*, *supra* note 183 at paras 8 to 18.

¹⁹³ *UsedSoft*, *supra* note 183 at para 21. If copyright exhaustion did not apply to such copies, then Oracle would retain control on future transfers of the copies. If exhaustion applied, Oracle would lose control on the secondary markets of its computer programs.

“The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy ...” As the Court pointed out, there were various possible interpretations of article 4(2) of *Directive 2009/24/EC* that revolved around the question of whether there was a need to put the computer program in circulation in a physical medium exchanged from hand-to-hand for the exhaustion of distribution rights to apply.¹⁹⁴ The Court found that the exhaustion of the distribution right in article 4(2) of *Directive 2009/24/EC* applied regardless of whether the right holder put the copies of computer programs in circulation with a physical supporting medium exchanged from hand-to-hand.¹⁹⁵

In arriving at the conclusion that copyright exhaustion applied to the online distribution of copies of copyright works, with no exchange of a physical supporting medium, the Court first needed to assess whether a transfer of ownership (sale) of the copy of the computer program had taken place, which is a requirement of the application of exhaustion. Second, it considered whether the distribution right set out in article 4(2) of *Directive 2009/24/EC* only applied when there was the transfer of a tangible physical object embedding the computer program. Third, it considered the distinction between the right of distribution and the right to communicate the computer program to the public and between goods and services. I will look at these three aspects of the Court’s judgment in the same order.

First the Court concluded that, based on the facts of the case, there was a transfer of ownership of the copy of the computer program.¹⁹⁶ The Court noted that the download of the copy of the computer program combined with the conclusion of a user licence constituted a whole for the purpose of their legal classification.¹⁹⁷ The Court relied on two components of the commercial transaction to conclude that there was a transfer of ownership of the copy downloaded from the Internet: the payment of a one-time fee and the fact that the user was allowed to use the copy for an indefinite period of time.¹⁹⁸ In property law and theory terms, the open-ended powers and privileges of the *usus* are transferred to

¹⁹⁴ *Ibid*, at para 32. The various interpretations are based on different applications of Article 4(2) of *Directive 2009/24/EC*, *supra* note 192 and EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, [2001] OJ, L167/10 [*Directive 2001/29/EC*], Preamble, recitals 28 and 29 & art 4 read in conjunction with Article 8 of the *WIPO Copyright Treaty*, 20 December 1996, WO033EN, online: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P8_189 [*WCT*] and the agreed statement concerning Articles 6 and 7 of *WCT*, the implementation of which forms part of the objectives of *Directive 2001/29/EC*.

¹⁹⁵ *UsedSoft*, *supra* note 183 at paras 53ff.

¹⁹⁶ *Ibid*, at paras 44 to 49.

¹⁹⁷ *Ibid*, at para 44.

¹⁹⁸ *Ibid*, at para 45.

the user with no duty to account to anyone.¹⁹⁹ With the indefinite right to use comes the right to further transfer the copy *abusus* by the application of exhaustion, subject to some conditions.²⁰⁰ The *fructus* is limited by the language of article 4(2) of *Directive 2009/24/EC* with respect to the exclusive rental rights on computer programs.²⁰¹

In my view, without referring explicitly to the *numerus clausus* principle, the Court's reasons are consistent with its application.²⁰² The Court looked at the essence of the transaction and interpreted the requirement of a sale²⁰³ in article 4(2) of *Directive 2009/24/EC* broadly. By doing so, the Court sided with the opinion of Advocate General Y. Bot and reasoned that what constitutes a sale needs to be assessed based on the substance of the transaction, otherwise the principle of exhaustion could be easily circumvented by suppliers:

as encompassing all forms of product marketing characterised by the grant of a right to use a copy of a computer program, for an unlimited period, in return for payment of a fee designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor, the effectiveness of that provision would be undermined, since suppliers would merely have to call the contract a “licence” rather than a “sale” in order to circumvent the rule of exhaustion and divest it of all scope.²⁰⁴

This is reminiscent of the earlier discussion of sale of goods and consumer law and on how courts are at times reluctant to enforce restrictive contract terms if the essence of the transaction is a sale, in spite of copyright holders' characterization of the transaction.²⁰⁵ In particular, I argued earlier that US courts' determination of software transactions as sales in spite of their qualification by copyright holders as licences can be explained, by the application of the *numerus clausus* principle.²⁰⁶ Arguably, this is indirectly what the European Court of Justice did in the *UsedSoft* judgment without explicitly referring to it. It supported the underlying rationale behind the application of the exhaustion of the

¹⁹⁹ Harris, *supra* note 7 at 30 defines “full-blooded ownership” as the relationship between persons and things such that they have *prima facie* unlimited privileges of use or abuse over the thing and *prima facie* unlimited powers of control and transmission. For Harris all ownership interests embed some use privileges and some control powers that are *prima facie* open ended: *ibid*, at 5.

²⁰⁰ I.e., provided that the user destroys any remaining copy after the transfer of the copy: *UsedSoft*, *supra* note 183 at para 70.

²⁰¹ *Supra* note 192.

²⁰² See the discussion on the *numerus clausus* principle in Chapter 7 Part IV.

²⁰³ *UsedSoft*, *supra* note 183 at para 42, the Court acknowledge that “sale” can refer to tangible or intangible property: “a ‘sale’ is an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him.”

²⁰⁴ *Ibid* at para 49.

²⁰⁵ See the discussion in Part II C of this chapter.

²⁰⁶ *Ibid*. See also Chapter 7 Part IV.

distribution right to copies that are *sold* only, i.e., reticence about any restriction to the alienation of property.²⁰⁷

Second, the Court assessed whether the distribution right in article 4(2) of *Directive 2009/24/EC* applied only to “tangible property” or whether it also applied to “intangible copies,” the latter being the case at hand.²⁰⁸ The Court concluded with no difficulty that the distribution right applied to both, through a plain textual interpretation of article 4(2) in conjunction with article 1(2) and recital 7 of the Preamble of *Directive 2009/24/EC*.²⁰⁹ Article 4(2) refers generally to the “sale ... of a copy of a program,” while article 1(2) extends protection of the Directive to the expression “in any form of a computer program,” which is supported by recital 7 of the preamble.²¹⁰

The Court reiterated the *lex specialis* character of *Directive 2009/24/EC* as regulating the protection of computer programs in relation to the broader framework of copyright protection in *Directive 2001/29/EC*.²¹¹ The Court neither sought to explain why there should be a different treatment for computer programs from that of other copyright works, nor did it have to decide whether the same conclusion could be made in respect of *Directive 2001/29/EC*.²¹²

It is not clear whether the *UsedSoft* judgment will have implications in Europe beyond the application of the distribution right and exhaustion of copies of computer programs. The result of this case, while it may be justified both based on a textual interpretation of article 4(2) of *Directive 2009/24/EC* and normatively (i.e., by eliminating the artificial distinction between tangible and intangible copies), is at odds with the language of *WCT* article 6 and how it was implemented by *Directive 2001/29/EC* unless it was to be interpreted broadly as extending the distribution right and its exhaustion beyond transfers of copies of copyright works involving a tangible object exchanged from hand-to-hand,²¹³ which,

²⁰⁷ I discuss the theoretical justifications of the exhaustion or first sale doctrine in Chapter 7 Part IIIA(ii).

²⁰⁸ *UsedSoft*, *supra* note 183 at paras 53-61.

²⁰⁹ *Supra* note 192.

²¹⁰ *UsedSoft*, *supra* note 183 at paras 55, 57.

²¹¹ *Ibid*, at para 56.

²¹² The Court simply stated that *Directive 2009/24/EC*, *supra* note 192, could be interpreted independently from *Directive 2001/29/EC*, *supra* note 194 given the clear intent expressed by the European Union legislature in article 4(2) of *Directive 2009/24/EC* to apply to *all copies* of computer programs (tangible and intangible): *ibid*, at para 60. The Court did not explain the relationship and compliance of *Directive 2009/24/EC* with *WCT*, *supra* note 193, article 6 which has been interpreted as applying only to the distribution of copyright works involving the transfer of a tangible object.

²¹³ In addition to giving a broad interpretation to tangible objects, the same result could be achieved by viewing *WCT*, *supra* note 194, art 6 as setting a substantive minima: in other words distribution can extend

although preferable, seems to go against the wording and intention of each instrument.²¹⁴ The *UsedSoft* judgment leads to the odd result of a different application of the distribution right and exhaustion rule to computer programs than to other copyright works for no apparent reason.

The third and last aspect of the *UsedSoft* judgment discussed here involves the distinction between the distribution right and the right to communicate to the public and that between goods and services. The Court rejected Oracle's argument that it had "made available to the public" the copy of the computer program on its website within the meaning of article 3(1) of *Directive 2001/29/EC*, which, by the application of article 3(3) of the same directive, cannot give rise to the exhaustion of the right of distribution of the copy.²¹⁵ Reminding us of the *lex specialis* character of *Directive 2009/24/EC* in relation to *Directive 2001/29/EC*, the Court went on to interpret the transfer of ownership of a copy as transforming an act of communication to the public into a distribution under which, if the conditions were present, exhaustion would apply.²¹⁶ This is consistent with the Court's determination of an online transmission as "the functional equivalent of the supply of a material medium."²¹⁷ By interpreting the two exclusive rights as such, the Court in my view filled the gap and inconsistency that subsists when refusing to apply exhaustion to digital copies of copyright works that are made permanently available (*transferred*) to users for ulterior *autonomous* consumption. The Court pointed to the essence of distribution (which typically involves the transfer of an original or copy of a copyright work) by contrast to a communication to the public by communication (which involves a service, the consumption of which always necessitates the intervention of a third party). While this judgment may only apply to computer programs, it leads to the question: why should it be limited

beyond physical objects and so can first sale. The tangible object sets the minimum requirement for the distribution right.

²¹⁴ *Directive 2001/29/EC*, *supra* note 194. The conclusion derives from the application of art 4.2 in conjunction with recitals 28 and 29 to the Preamble: *ibid*. See however EU, Opinion Advocate General Bot, Case C-128/11, *Axel W. Bierbach, administrator of UsedSoft GmbH v Oracle International Corp.*, 24 April 2012 at paras 75-76, where the Advocate General raises doubts as to whether *Directive 2001/29/EC*, *supra* note 194, limits the distribution right and its exhaustion to copyright works embodied in physical objects. See also U.S. Copyright Office, *A Report of the Register of Copyrights pursuant to section 104 of the DMCA* (2001) online :http://www.copyright.gov/reports/studies/dmca/dmca_study.html [*DMCA 2001 Report*] at 86-87 where the Register of Copyright held the view that the presence of a physical object embedding the copyright work is a defining element of the first sale doctrine arguing that it is based on the distinction between the rights in the tangible object and the rights in the intangible object, implying that this divide cannot subsist with respect to digital copies distributed online.

²¹⁵ *UsedSoft*, *supra* note 183 at para 50.

²¹⁶ *Ibid* at para 52, where the Court interpreted *WCT*, *supra* note 194, art 6(1) and its implementation through *Directive 2001/29/EC*, *supra* note 194, art 3-4.

²¹⁷ *Ibid*, at para 61.

computer programs? The *UsedSoft* judgment emphasizes, in my view, the inconsistencies of *Directive 2001/29/EC* when applied to digital copies transferred online with no supporting physical medium. *Directive 2001/29/EC* trivializes the property rights to the copy that users lawfully acquired, through a misapplication of the distinction between goods and services.²¹⁸

The Supreme Court of Canada recently came to a similar conclusion in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada* [*Entertainment Software Association*].²¹⁹ In that case, the Court had to decide whether the downloading of video games through the Internet amounts to a communication to the public by telecommunications of the musical works the games contain, and can, therefore, be the object of a separate tariff.²²⁰ In a five-to-four decision, the Court held that this act involved no act of communication to the public and could not trigger the application of a separate tariff. Abella and Moldaver JJ. for the majority defined the act of downloading copies of copyright works as follows:

In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.²²¹

In so holding, the Supreme Court of Canada expressed a view similar to the European Court of Justice in *UsedSoft* on the functional equivalent between the online delivery of the copy of a computer program and the supply of a material medium.²²²

To sum up, by holding that the exclusive right of distribution and exhaustion apply to copies of computer programs distributed online with no supporting physical medium, *UsedSoft* goes against the prevailing interpretation of copyright exhaustion at the international and regional levels. I showed how the understanding of the reasons in *UsedSoft* can be enriched through property law and theory principles and how it is consistent therewith. In spite of its *lex specialis* application to computer programs, *UsedSoft* could have important consequences on the future application of copyright exhaustion to copies of copyright works distributed online with no supporting physical media. At a

²¹⁸ See the discussion on *Directive 2001/29/EC*, *supra* note 194, above in this part.

²¹⁹ *Supra* note 115.

²²⁰ In that case, the tariff in question had been submitted by SOCAN to the Canadian Copyright Board for approval: *Ibid.*

²²¹ *Ibid.*, at para 5.

²²² *UsedSoft*, *supra* note 183 at para 61.

normative level, *UsedSoft* questions why this should not also be the case with respect to other forms of copyright works beyond computer programs.

A closer look at the copyright exclusive rights that may be actually involved in the online delivery of digital copies of copyright works underscores the inconsistencies that result from singling out digital copies delivered online for permanent consumption from the distribution right and from the rule of exhaustion. To include digital copies distributed online in the distribution right and in the application of the exhaustion rule with respect to *all* copyright works and not just computer programs, i.e., extending the outcome in *UsedSoft*, would fill that void.

IV. Unified approach to the qualification of goods and to the scope of exhaustion (the first sale doctrine) through property law and theory

The presence of a physical medium exchanged from hand-to-hand that embeds copies of copyright works is a determinant factor to identify the whole as goods under the sale of goods and consumer law and for the exhaustion of the distribution right to apply in copyright law.²²³ This leaves the increasingly widespread online distribution of copies of copyright works in a zone of legal uncertainty and inconsistency about their nature and the application of copyright exhaustion.

As I argued above in this chapter, this requirement is misguided and artificial, both in the case of sale of goods/consumer law and in the application of copyright exhaustion. In the case of the application of sale of goods and consumer law, this requirement stems from a narrow application of the concept of tangibility²²⁴ and from a misunderstanding of its role in the determination the presence of goods as opposed to the concept of movability, transferability, and identification at the time of sale.²²⁵ Occasionally, the requirement flows from a misconception of the presence of copyright embedded in the product, i.e., intangible property (or chose in action) that is sometimes excluded altogether from the application of sale of goods and consumer law.²²⁶ In other cases, the confusion flows from the

²²³ See the discussion in Part II A and Part III of this chapter.

²²⁴ I.e., one that fails to recognize the physical nature of a musical recording, computer program or film with or without a supporting physical medium exchanged from hand to hand.

²²⁵ See Horovitz, *supra* note 43. See the discussion on the tangible v. intangible dichotomy in Part II A.

²²⁶ See the discussion on the tangible v. intangible dichotomy in Part II A.

distinction between goods and services or as a result of the presence of a licence agreement.²²⁷ With respect to the application of copyright exhaustion, the requirement of tangibility (in the narrower sense) was enshrined by the *WIPO Internet Treaties*²²⁸ as one determining factor for the application of the exclusive right of distribution and, potentially, for the concept of exhaustion to apply to the transfer of copies embedded in a physical medium.²²⁹ The requirement of a physical object embedding the copyright work for the application of the exclusive distribution right and its exhaustion has been reinforced by the implementation of the *WIPO Internet Treaties* at the regional and national levels.²³⁰ The outcome in *UsedSoft*, where the European Court of Justice applied the exhaustion of the distribution right to computer programs distributed online, contrasts with the prevailing assumptions about the non-application of copyright exhaustion to copies of copyright works distributed online. The limited application of the judgment to computer programs leads to the question of why computer programs should be any different in that regard than other copyright works distributed online. Using the interpretation in *UsedSoft* and in *Entertainment Software Association* of the exclusive right of distribution with the right to communicate to the public by telecommunication, I also raised the unintended consequences of a distribution right limited to copies of copyright works transferred with a physical supporting medium exchanged from hand-to-hand.²³¹

In the case of sale of goods/consumer law and in the case of the application of copyright exhaustion, the artificial requirement of a physical supporting medium exchanged from hand-to-hand potentially leads to the narrowing of copyright users' rights.²³² To allow the radically different treatment of digital copies distributed online from other copies by focusing exclusively on the interests of copyright holders reflects a trivialization of the copy owners' property rights. It exemplifies a copyright-holder-centric approach to regulation that too often forgets the property regime from which it was elaborated.

²²⁷ See Part II B and C of this chapter.

²²⁸ I.e., *WCT*, *supra* note 194, art 6 and *WIPO Performances and Phonograms Treaty*, 20 December 1996, WO034EN, online: http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html [*WPPT*], art 8.

²²⁹ See Chapter 3 Part II F.

²³⁰ *Ibid.*

²³¹ *Ibid.*, i.e., that in some cases, neither the distribution right nor the right to communicate to the public by telecommunication would be involved.

²³² Except in cases that could lead to the unintended consequences of the non-application of exhaustion of the distribution right combined with the non-application of the right to communicate the work by telecommunication: see Chapter 3 Part II F.

It is not all that surprising that the various fields of law, e.g., sale of goods/consumer law and copyright law (i.e., the exhaustion rule) rely on similar concepts to delineate their scope of application with respect to digital copies of copyright works. Large segments of sale of goods/consumer law are founded upon basic concepts of property law.²³³ In the case of copyright exhaustion, one of its most frequently invoked justifications is to avoid restrictions against alienation of property, which, as I argued in Chapter 7, seeks, *inter alia*, to preserve the integrity of property ownership.²³⁴ What may (or may not) be more surprising is that they each lead to the similar inconsistent treatment of digital copies distributed online with no transfer of a physical supporting medium exchanged from hand-to-hand.

In light of the common reliance on foundational concepts of property in sale of goods/consumer law, and with respect to copyright exhaustion, a more reasoned approach to digital copies of copyright works requires reverting to basic principles of property. First, there is a pressing need to rethink the requirement of tangibility both as a determining factor to the goods-like nature of digital copies of copyright works and for the application of copyright exhaustion. This should be done in two ways: (i) by a broader application of the concept of tangibility, i.e., an application that acknowledges that copies distributed online are no less physical than the ones distributed with a supporting medium exchanged hand-to-hand, and (ii) by recognizing that movability, transferability, and identification at the time of the sale should be the determining criteria for goods, not a narrow application of tangibility. At the heart of these criteria lies the concept of ownership that does not need the support of a physical medium to exist, but does require movability, transferability, and identification. By those requirements, the artificial distinction between digital copies supported by physical medium exchanged from hand-to-hand and digital copies distributed online disappears when these elements are present.

Second, copyright works are commercialized through an increasing variety of options, including goods only, services only, or a combination of the two. This mandates a clearer understanding of the distinction between goods and services. Building upon the criteria that should determine whether products are goods, i.e., movability, transferability, and identification at the time of the transfer, the

²³³ See the discussion about the foundational principles of property law in sale of goods law in Part II A of this chapter.

²³⁴ See the discussion in Chapter 7 Part III A (ii).

faculty of ownership of goods and not of services needs to be emphasized.²³⁵ The quality of movability and separateness that comes with ownership of personal property entails the open-ended autonomous and independent faculty to use and *consume* the goods, with no reliance on any external forces or operations, which is not present in the case of services.²³⁶

While the concept of property ownership will help in providing a more coherent approach to the distinction between goods and services, the adequate regulation of information products requires a rethinking of the different levels of protection (e.g., implied obligations of quality, fitness, and quiet possession) that still prevail between goods and services. For instance, the automated and highly standardized level of services related to information products mandate similar levels of protection to those of goods (strict liability v. fault-based liability).

Third, there is a need to resolve the lingering confusion about licence agreements as opposed to sale agreements and the reliance courts have put on the presence of licence agreements to conclude that products are not goods or that copyright exhaustion did not apply.²³⁷ First, the presence of a sale is not a condition *sine qua non* for the existence of goods, which can be leased, hired, donated, etc. Second, there is a distinction between the licence to the intellectual property rights of the right holder in the work, rights which are either explicitly or impliedly part of commercial transactions involving copies of copyright works, and the licence or sale *to/of the copy* of the copyright work. In the latter case, I argued that through the application of the *numerus clausus* principle, any commercial transaction that resembles in all material terms a sale should be treated as such regardless of its appellation by copyright holders.²³⁸ This is the approach that the European Court of Justice adopted in *UsedSoft*, as well as the one adopted by some courts in the US.²³⁹ The application of the *numerus clausus* principle will preserve the integrity of copy ownership and bring copyright law closer to its core objectives, while ensuring a better balance between the exclusive rights of copyright holders and the property rights of copy owners.

²³⁵ See the discussion in Part II B of this chapter.

²³⁶ *Ibid.*

²³⁷ See the discussion in Part II C and in Part III of this chapter.

²³⁸ See the discussion on the *numerus clausus* principle in Chapter 7 Part IV.

²³⁹ See the discussion in Part III of this chapter.

V. Conclusion

This chapter introduced the application of consumer law to copies of copyright works by looking at basic issues of scope that foreshadow the erratic nature of the exercise. The traditional struggles about the treatment of copies of copyright works as goods, services, or of a *sui generis* nature are exacerbated with respect to digital copies made available online. The characterization of the commercial transaction under which they are made available, i.e., a sale or a licence, is sometimes mixed with the determination of the nature of copies of copyright works, thereby leading to similar inconsistent results. With that, the scope of protection of statutory consumer protection obligations is unclear, ultimately leaving possible recourse of copyright consumers to the common law. This leads to even more uncertainty in an increasingly large segment of copyright consumer products.

A legal analysis leading to the inapplicability of the statutory implied obligations of sale of goods and consumer law to an increasingly large number of copies of copyright works runs against their underlying purpose. That is, to codify and clarify the common law and adapt it to the requirements of consumer transactions in a legal form that is more readily accessible to consumers.²⁴⁰ The potential inapplicability of statutory implied obligations of sale of goods and consumer law is at odds with the recent impetus in Canada and worldwide to adapt consumer laws to electronic commerce and the information age so as to make them more relevant and responsive to consumers.²⁴¹ The deliberate approach, or unintended consequences to leave an increasingly large number of information products

²⁴⁰ In a U.S. context, in the leading case on the nature of computer software *Advent Systems*, *supra* note 87, the U.S. Court of Appeals, Third circuit referred to the policy objectives behind the adoption of the *US UCC*, *supra* note 23: "Applying the U.C.C. to computer software transactions offers substantial benefits to litigants and the courts. The Code offers a uniform body of law on a wide range of questions likely to arise in computer software disputes: implied warranties, consequential damages, disclaimers of liability, the statute of limitations, to name a few. The importance of software to the commercial world and the advantages to be gained by the uniformity inherent in the U.C.C. are strong policy arguments favoring inclusion." See also Horovitz, *supra* note 43 at 134-135.

²⁴¹ Initiatives at the international level relating to consumer protection in the context of electronic commerce include the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (1999) available online at: http://www.oecd.org/document/18/0,3746,en_2649_34267_44132242_1_1_1_1,00.html. In Ontario, major amendments to the *OCPA*, *supra* note 10, including its consolidation with other pre-existing laws, came into force in 2005. Several new provisions were added to specifically address electronic commerce, including a section dealing specifically with Internet agreements (e.g. ss. 37ff.). See Government of Ontario, "Backgrounder *The Consumer Protection Act*", June 27, 2006, available online at: http://www.mgs.gov.on.ca/en/News/Print/STEL02_047088.html.

out of the ambit of the protection offered by these laws deserves more attention and a more coherent legal framework based on traditional concepts of property and ownership.²⁴²

The identification of root causes of this inconsistent treatment of digital copies of copyright works enabled parallels to be made with the application of copyright exhaustion to copies distributed online. Current trends will lead to a potential shrinking of copyright consumers' rights and protection of the copies they lawfully acquire. Reliance on basic concepts of property law and theory provides a reasoned approach to elucidate when copies of copyright works should be treated as goods and when copyright exhaustion should apply.

The ongoing hesitations and tribulations about treating copies of copyright works as goods and to protect them as such should come as no surprise. The hesitations in sale of goods and in consumer law to protect commercial copies of copyright works as goods, mirror the trivialization in copyright law of the property rights in commercial copies of copyright works.

The inconsistencies that this chapter underscored about the uncertain application of consumer law to an increasingly large number of copies of copyright works distributed online should not stand in the way of the further exploration of how consumer law can help substantiate consumers' rights to the copies. In the next chapter, I dig the trenches further for the application of consumer law to copies of copyright works by laying out which of the consumer protection obligations may be of particular appeal to help ascertain consumers' rights to copies of copyright works.

²⁴² For instance, by applying a more informed interpretation of “tangible” and “goods” as encompassing digital copies of copyright works, and by a proper characterization of licences with respect to the copy of the copyright work as potentially involving a transfer (e.g. a sale). See a proposed framework to guide legislative reform in Chapter 12.

Chapter 9

Paving the Way: The Application of Consumer Law Obligations to Restrictions of Uses of Commercial Copies of Copyright Works

I. Introduction

In the previous chapter, I introduced the application of sale of goods and consumer law to copies of copyright works, along with troubling issues of scope that put in question the application of consumer statutory protection to copies of copyright works, in particular, sellers' implied obligations.¹ I argued that the ongoing hesitation to treat copies of copyright works similarly to other consumer goods is consistent with the trivialization in copyright law of property rights in copies of copyright works.² It explains to some extent why the application of sale of goods and consumer law to copies of copyright works is a relatively little-theorized area of the law. This body of law is *a priori* inhospitable to copyright consumers and other users alike, and the recent growing interest on the place of copyright users has mostly been concentrated on showing the shortcomings within copyright law itself.³

There are exceptions to the narrative whereby copyright consumers and other users are being predominantly scrutinized within the confines of copyright law. As I discussed in Chapter 3, scholarly work on the limitations to copyright holders' exclusive rights and, in particular, how they interact with contract, includes resorting to legal doctrines and policy considerations within and outside copyright law. Among those doctrines and considerations, the possible use of consumer protection law as a legal tool to substantiate limitations on copyright holders' exclusive rights for the benefit of consumers has been invoked.⁴ The increasing areas of friction between the rights of copyright consumers and those of copyright holders⁵ and recent law and policy work undertaken by the EU on consumer protection⁶

¹ *I.e.*, the uncertain qualification of copies of copyright works as goods and the inconsistent treatment of the legal transaction (*i.e.*, sale or licence) through which they are made available to consumers: see the discussion in Chapter 8.

² This is one of the central arguments throughout the Second Part of my thesis, *i.e.*, Chapter 4 to Chapter 8.

³ See the discussion in Chapter 2, in particular Part IV.

⁴ See the discussion in Chapter 3 Part III and Part IV.

⁵ I discuss the root causes of this increased tension in Chapter 1 Part I and Part II.

⁶ The more recent legislative development at the EU level is *EC, Council and Parliament Directive 2011/83/EU of 22 November 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council* [2011] OJ L 304/64 [*Directive 2011/83/EU*]. Prior EU papers and other works leading to the adoption of this directive include:

have led European scholars, including Lucie Guibault, Natali Helberger, Bernt Hugenholtz, Robert Bradgate, to look at the specific issues raised by the application of sale of goods and consumer law to digital content or products that for a great part involve works protected by copyright.⁷ The objective to increase consumer confidence within the broader integration of the European Union market and through the harmonization of consumer protection laws brings the question of consumer protection to the forefront.⁸ As a result, there is a more immediate interest to look at the developments of growing markets, including digital content, by policy-makers,⁹ consumer interest groups,¹⁰ and scholars.¹¹ The

EC, *The Green Paper on the Review of the Consumer Acquis* (Brussels, EC, 2006) and EC, *Proposal for a Directive of the European Parliament and of the Council on consumer rights* (Brussels, EC, 2008).

⁷ Lucie Guibault & Natali Helberger, "Copyright law and Consumer Protection, study carried out for the European Consumer Law Group" (2005) ECLG/035/05; Natalie Helberger & P. Bernt Hugenholtz, "No place like home for making a copy, private copying in European copyright law and consumer law (2007) 22 Berkeley Tech L.J. 1061 at 1078-1095; Robert Bradgate, "Consumer rights in digital products", (2010) online: [http://www.google.ca/search?sourceid=navclient&ie=UTF-8&rlz=IT4ADBF_enCA275CA275&q=Bradgate%2c+Consumer+rights+in+digital+products+2010](http://www.google.ca/search?sourceid=navclient&ie=UTF-8&rlz=IT4ADBF_enCA275CA275&q=Bradgate%2c+Consumer+rights+in+digital+products+2010;); Marco B.M. Loos, Natali Helberger, Lucie Guibault, Chantal Mak, Lodewijk Pessers, Katalin J. Cseres, Bart van der Sloot & Ronan Tigner, *Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts* (2011) University of Amsterdam, Centre for the Study of European Contract Law (CSECL), Institute for Information Law (IViR), Amsterdam Centre for Law and Economics (ACLE), online: http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.html.

⁸ This is reflected in the primary and secondary law of the European Union which refers as a base to a high level of protection. *The Treaty on the Functioning of the European Union (consolidated version)*, OJEU C83/47, 30.03.2010, provides at art 114 (3): "The Commission, in its proposals envisaged in para 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection [...]. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.", and at art. 169 (1): "In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests." Several European directives impose obligations on member states with respect to consumer protection laws. The consumer protection directives that are currently in force are available at the European Commission Justice (consumer protection and marketing section) official website: http://ec.europa.eu/justice/consumer-marketing/law/index_en.htm.

⁹ For an overview of the ongoing policy consultation work that is conducted by the European Commission, DG Health and Consumers, see the official website of the European Commission (Consumer Affairs Division): http://ec.europa.eu/consumers/rights/cons_acquis_en.htm#comp.

¹⁰ For example, see: BEUC, *Digital Products, How to include them in the Proposal for a Consumer Rights Directive*, Position Paper, Brussels, 2010, online: <http://www.beuc.org/Content/Default.asp?PageID=2135>. Beuc, The European consumers' organisation, is the umbrella organisation for 42 independent national consumer organisations across Europe. Its main task is to represent the interests of these organisations and all consumers across Europe: see Beuc, The European consumers organisation official website at: <http://www.beuc.org/Content/Default.asp?PageID=591>. The INDICARE Project (2004-2006) focused on consumer protection issues around information products, more specifically digital rights management issues. As stated on its website: "The INDICARE project was financially supported as an Accompanying Measure under the eContent Programme of the Directorate General Information Society of the European Commission (Reference: EDC - 53042 INDICARE /28609). INDICARE started first of March 2004 and ended February 2006." online: <http://www.indicare.org/application.php>.

interaction between copyright law and consumer law does not trigger the same interest in Canada as it does in the EU, and I am not aware of scholarly work looking in detail at the application of sale of goods and consumer law to copies of copyright works. Similarly, there is relatively little case law in Canada and in the other jurisdictions examined here, particularly on the application of consumer protection law to commercial copies of copyright works.¹²

Different hypotheses can be advanced to explain the lack of consumer protection jurisprudence as it relates to commercial copies of copyright works. It could be interpreted as an indicator that the commercial distribution of copies of copyright works does not give rise to important concerns and that the market functions well in that area. Conversely, it could be an indicator that various factors and obstacles that are specific to commercial copies of copyright works make it even more difficult for consumers to assert their claims than in relation to other products.¹³ Regardless of the root causes for the lack of jurisprudence on the application of consumer law to commercial copies of copyright works, the sheer complexity of applying sale of goods and consumer protection law to commercial

¹¹ Two recent reports are of particular interest: Loos & al., *supra* note 7; Bradgate, *supra* note 7.

¹² In Canada, there is case law on the application of sale of goods law implied obligations to computer software and hardware: see Chapter 8 Part II. One recent highly publicized class action involving the use by Sony BMG of technological protection measures on music CDs that had harmful effects on computer systems was eventually settled: See *Guilbert v Sony BMG Musique (Canada) inc.* [2007] R.J.Q. 983, J.E. 2007-843 (Que SC) which refers to similar class actions undertaken in other provinces in Canada. The technological measure allowed Sony BMG to collect personal information by tracking the use made by consumers of the CDs without their knowledge. There is jurisprudence on the application of implied obligations to computer programs under the *Uniform Commercial Code*, Official Text (2000) (amended 2003) online: <http://www.law.cornell.edu/ucc/ucc.table.html> [US UCC], as implemented by the various States: See Chapter 8. In France, there is jurisprudence applying the *Code Civil* and the *Code de la Consommation* to copies of copyright works in consumer transactions: Trib. gr. inst. 6e Nanterre, 2 Septembre 2003, *Françoise M. / EMI France, Auchan France*, online : <http://www.legalis.net/jurisprudence-decision> [*EMI France*]; Trib. gr. inst. 5^e Paris, 10 January 2006, *Christophe R., UFC Que Choisir / Warner Music France, Fnac*, (2006) JurisData: 2006-292685 [*Warner Music*] reversed on appeal: Court of Appeal 4^e A , Paris, 20 June 2007, *Fnac Paris / UFC Que Choisir et autres*, online: <http://www.legalis.net/jurisprudence-decision>; confirmed by Cour de cassation, civ. 1^{ère}, 27 Novembre 2008, *UFC Que Choisir / Fnac, Warner music France*, online: <http://www.legalis.net/jurisprudence-decision>; Court of Appeal, Paris, 4 April 2007, *Studio Canal et al. v S. Perquin and Union fédérale des consommateurs Que choisir*, Gaz. Pal. 18/07/2007 N° 199, 23., confirmed by Cass civ 1st, 19 juin 2008 (2008) Bull civ, I, N° 177.

¹³ As a starting point, there are important obstacles to the enforcement to consumer claims generally. For a recent overview of the different theories and strategies employed for the regulation of consumer protection and enforcement issues, see, Fabrizio Cafaggi & Hans W. Micklitz, eds., *New Frontiers Of Consumer Protection: The Interplay Between Private And Public Enforcement* (Cambridge: Intersentia, 2009), in particular Samuel Issacharoff & Ian J. Samuel, "The Institutional Dimension of Consumer protection" at 47-62.

digital copies of copyright works should in and of itself be a cause of concern.¹⁴ The European studies conducted on the application of sale of goods and consumer protection law to commercial copies of copyright works corroborate that view.¹⁵ The predominance of non-negotiated standard end-user agreements in the market of information products distributed online, coupled with the general lack of attention that copyright holders and distributors give to users' permitted uses under copyright law, is one specific area of concern that I discussed in Chapter 3.¹⁶ These characteristics of the incessantly growing market of information products distributed online add to the more fundamental issues of the ability of consumers to enforce consumer protection law obligations generally.¹⁷ Unearthing consumer protection concerns with respect to commercial copies of copyright works may increase the attention of consumer protection law agencies in this area, attention that has, so far, been low to non-existent.¹⁸ By the same token, pointing to specific consumer protection issues can raise consumers' awareness of their rights in commercial copies of copyright works as well as their ability to enforce them.

In this chapter, I intend to fill the void in Canadian scholarly work on, and consumer protection agencies' attention to, the application of sale of goods and consumer law to commercial copies of copyright works. I develop an argument about how Canadian sale of goods and consumer protection law can effectively support consumers in their claims to permitted uses of copies of copyright works. I look at the nature of statutory implied conditions and warranties ("implied obligations"), e.g.,

¹⁴ See the discussion in Chapter 8 and see the application of sale of goods and consumer protection law to commercial copies of copyright works in Chapter 11.

¹⁵ Bradgate, *supra* note 7; Loos & al., *supra* note 7.

¹⁶ In particular, in Part III C of Chapter 3.

¹⁷ For a recent overview of the different theories and strategies employed for the regulation of consumer protection and enforcement issues, see, Cafaggi & Micklitz, *supra* note 13.

¹⁸ Consumer protection laws are often construed around the regulation of specific targeted industries that present higher risks for consumers (e.g. consumer credit agreements, personal services contracts, tourism agency agreements). For example see the Ontario *Consumer Protection Act*, S.O. 2002, c. 30, schedule A, [OCPA] and the Québec *Consumer Protection Act*, R.S.Q., c. P-40.1 [QCPA] none of which target information products or copies of copyright works. Even categories of contracts that are regulated by consumer protection laws (e.g. distance contracts, clauses pertaining to Internet agreements) and that are particularly relevant to copies of copyright works, generally cover peripheral contractual issues (contract formation, notification, opposability, etc...) more than they address the substance of the transaction. The corollary is that governmental consumer protection agencies activities will generally mirror their constitutive consumer protection legislation. See for example the segments of the industry specifically addressed by the Office de la Protection du Consommateur (Québec) http://www.opc.gouv.qc.ca/Webforms/PlanDuSite_En.aspx: Vehicules, Home, Furniture and Appliances, Computer and Electronics (i.e. purchases online, telecommunication services), Personal effects, Travel, Finance & Insurance, Services subscriptions & Membership. See also the segments of industry that are under the scrutiny of UK Office of Fair Trading, online: <http://www.oft.gov.uk/> : Construction and property, Consumer credit, Financial and Professional Services, Pharmaceutical and health, Retail and wholesale, Transport.

primarily those of quality, fitness for purpose, and quiet possession,¹⁹ and at their application to the restrictions on uses of copies of copyright works.²⁰ I also look at the information disclosure requirements and the prohibitions against unfair practices.²¹ This will set the foundations for their specific application to scenarios involving copies of copyright works in Chapter 11, after looking at their underlying theoretical justifications in Chapter 10.

The application sale of goods and consumer protection law to copies of copyright works is not an insignificant task in a context where copyright law has been widely viewed as setting the agenda for the rights in copies of copyright works, leading to their trivialization, as I discussed in the Second Part of my thesis. This is mirrored by their uncertain protection under sale of goods and consumer law, as I discussed in Chapter 8. I argue that in making room for consumers' rights to copies of copyright works we need to frame restrictions to consumers' permitted scope of use of copies of copyright works as a quality, fitness for purpose, quiet possession, information disclosure, and other consumer law obligations' issue.

In presenting the panoply of consumer protection obligations, I start with the more interventionist then move through to the lesser interventionist obligations and their variations throughout the provinces and territories of Canada, with comparisons to the other jurisdictions examined here.²² Interventionism is assessed both from the perspective of how the relevant consumer protection obligations impinge on suppliers' freedom of contract in favour of consumers, as well as on the remedies that are available to consumers if the obligations are breached.²³ I focus on the issues that are specific to copies of copyright works that are due to the complex interaction between the property rights of copyright holders as dictated by copyright law, the ownership or possessory rights of

¹⁹ And to a lesser extent, implied obligations of conformity with description and of title and freedom from encumbrances: see Part II of this chapter.

²⁰ I apply the consumer protection obligations discussed in the present chapter to various scenarios of uses of copies of copyright works in Chapter 11.

²¹ In this chapter, "consumer protection obligations", "consumer obligations" or "consumer protection law obligations" refers to implied obligations, information disclosure requirements and provisions against unfair practices, and are analysed in Part II of this chapter.

²² I.e., the US, the EU, the UK and France.

²³ See the discussion in Part II, III and IV of this chapter, starting with the review of consumer protection statutory implied obligations, then pursuing with a discussion on provisions against unfair practices and ending with an analysis of the implications of specific information disclosure requirements in distance contracts and Internet agreements.

consumers in copies of copyright works, and the extent to which these rights can be altered by contract or ascertained by statutory consumer protection obligations.

Three recent French cases involving consumer groups taking action against film and music distributors of music CDs and film DVDs, raise several of the issues central to a consumer law analysis to copies of copyright works that are discussed in this chapter and the remainder of the Third Part of my thesis. They are: *EMI France*,²⁴ *Warner Music*,²⁵ and *Studio Canal et al. v S. Perquin and Union fédérale des consommateurs Que choisir*.²⁶ First, they illustrate the centrality of the characterization of limitations to copyright holders' exclusive rights as "exceptions to copyright infringement" rather than "rights" to the possible application of consumer law to copies of copyright works. Consumers can initiate claims on the basis of rights, but less so on the basis of exceptions to copyright infringement. Second, this characterization has rippling effects, including whether limiting consumers' exercise of permitted uses without copyright holders' permission (e.g., on the basis of a "right" or an "exception" under copyright law) constitutes material information that needs to be disclosed to consumers.²⁷ Third, in the realm of statutory warranties and implied obligations, the French cases²⁸ touch upon the potentially narrowing effects of the application of a latent defects analysis rather than a broader warranty of quality and fitness for purpose to copies of copyright works.²⁹ Fourth, they exemplify how a juxtaposition of technological protection measures on copyright holders' exclusive rights impacts a consumer law analysis to rights in copies of copyright works. Last but not least, they illustrate what type of remedies consumers can seek in case of breach by copyright holders of statutory warranties, including specific performance, e.g., an order for removal of technological measures on the musical recording or film.

In Part II, I discuss the nature and scope of statutory implied consumer protection obligations that are relevant to assert the permitted scope of use of copies of copyright works, i.e., implied obligations of

²⁴ *Supra* note 12.

²⁵ *Ibid.*

²⁶ Cour de cassation, civ. 1^{ère}, 28 February 2006, overruling *Studio Canal et al. v S. Perquin and Union fédérale des consommateurs Que choisir*, Paris Court of Appeal, 22 April 2005, available at <http://www.juriscom.net/documents/caparis20050422.pdf> [Mulholland Drive]; Court of Appeal, Paris, 4 April 2007, *Studio Canal et al. v S. Perquin and Union fédérale des consommateurs Que choisir*, Gaz. Pal. 18/07/2007 N° 199, p. 23., confirmed by the Cour de Cassation, civ. 1^{ère}, 19 juin 2008.

²⁷ This interaction is discussed in Part IV B of this chapter.

²⁸ *Supra* note 25 and 26.

²⁹ By narrowing the discussion to the existence or not of a defect and whether the purchaser was aware of the defect at the time of the sale. This is further discussed in Part II A of this chapter.

quality, fitness for purpose, quiet possession, and, to a lesser extent, correspondence with description, title, and freedom from encumbrances. In Part III, I look at prohibitions against unfair practices and how they are of relevance to current copyright holders' commercial practices. In Part IV, I describe the nature and function of information disclosure requirements generally and how they impact on the other implied consumer obligations examined in this chapter, as well as more specifically as it pertains to certain contracts.³⁰ In Part V, I conclude by selecting specific features of consumer law as well as those consumer protection obligations that are more likely to provide ammunition to consumers to assert their claims to permissible uses of commercial copies of copyright works and counter the copyright-holder-centric regime of copyright law as amplified by copyright holders' commercial practices.

II. The scope and operation of statutory implied obligations in consumer contracts

In this part, I will present a Canadian overview of the nature and scope of statutory implied obligations in consumer contracts with reference to other jurisdictions,³¹ focusing on the elements that emphasize the unique features of consumer protection as a body of law and that may be of particular relevance and appeal for the protection of consumers of commercial copies of copyright works. They are: statutory implied obligations of (i) quality and fitness for purpose, (ii) correspondence with description, and (iii) title, quiet possession, and freedom from encumbrances. I will start by introducing the points of similarity between the statutory implied obligations.

The consumer protection provisions that specifically address the quality, fitness for purpose, and other characteristics of goods sold or services supplied under consumer contracts fall into distinct categories. First, these transactions are regulated by statutory implied³² conditions or warranties.³³

³⁰ E.g., distance selling agreements and Internet agreements as it is further discussed in Part IV A.

³¹ I.e., the US, EU, UK and France.

³² As one commentator notes, a better terminology may be to refer to "constructive": Angela Swan, *Canadian Contract Law*, 2d edition (Toronto: Lexis-Nexis Canada, 2009) at 471ff. See also the discussion on the implication of terms at 531 and at 535.

³³ In most provinces in Canada, statutory implied conditions apply with respect to quality, fitness for purpose and correspondence with description, with the exception Saskatchewan under the *Saskatchewan Consumer Protection Act*, SS 1996, c C-30.1 [*SCPA*], and New-Brunswick under the *New Brunswick Consumer Product Warranty and Liability Act*, SNB 1978, c. C-18.1 [*NBCPWLA*], where statutory implied warranties apply. In the *SCPA*, specific remedies apply when the breach of the implied warranty is of a "substantial character: *SCPA*, s 39 c). In Québec, although ss 37 and 38 refer to "guaranties" (i.e. "warranties" in the English version), they give rise to a broad range of remedies through the application of s

They differ from each other by the remedies available to consumers in case of breach.³⁴ Second, in the majority of provinces and territories, the statutory implied obligations are mandatory, and are considered as *ordre public* in Québec, with penal sanctions applicable in case exoneration clauses are used.³⁵ In other provinces, implied obligations can be overridden by contract.³⁶ Common law implied obligations may continue to apply to certain transactions that fall outside the scope of the relevant provincial or territorial statutes.³⁷ For instance, this could be the case if commercial copies of copyright works distributed online were to be excluded from the definition of goods.³⁸ As a result, the application of the maxim *caveat emptor* has progressively become the exception rather than the rule in consumer transactions.³⁹

The minimum protection offered by the mandatory nature of the statutory implied obligations in some of the Canadian jurisdictions and elsewhere⁴⁰ is of increasing significance for consumers purchasing

272 of the *QCPA*, *supra* note 18. In all provinces and territories of common law tradition in Canada, statutory implied warranties of quiet possession apply.

³⁴ Traditionally, the breach of a warranty entitles the claimant to seek damages. The breach of a condition entitles the claimant to rescind the contract and/or to seek damages: Stephen M. Waddams, *The Law of Contracts*, 5th edition (Toronto: Canada Law Book Inc., 2005) at para 586; Swan, *supra* note 32 at 472. When the product is not rejected by the buyer, the applicable statutory condition is converted into a warranty, with the consequence that the available remedy is damages: *Ramnarine v Koren*, 2008 Carswell Ont 8363 (OSC) at para 36.

³⁵ See *QCPA*, *supra* note 18, ss 261, 277.

³⁶ This is the case in Alberta (*Sale of Goods Act* R.S.A. 2000, c. S-2 [ASGA], ss 15-16); Newfoundland & Labrador (Newfoundland and Labrador *Sale of Goods Act*, R.S.N.L. 1990, c. S-6 [NLSGA], s 15(1), s16 c) and e); Prince Edward Island (Prince Edward Island *Sale of Goods Act*, R.S. P.E.I. 1988, c. S-1. [PEISGA], ss 15, 16 b) and c) and in some cases New-Brunswick (NBCPWLA, *supra* note 33, ss 24-26, restrict the cases where the statutory implied warranties can be excluded by contract if for instance “It is shown that it would not be fair or reasonable to allow reliance on such agreement.” (s 25 (1)) and if the consumer suffers losses for which seller would have been otherwise liable had the contract not been made (s26)).

³⁷ For example, if the supply of copies of copyright works does not qualify as a good or in some case if it does not correspond to a sale: see the discussion in Chapter 8.

³⁸ See the discussion in Chapter 8.

³⁹ The only transactions for which the maxim *caveat emptor* may continue to apply would be with respect to private sales, unless there was a fundamental breach of the contract: *Frey v Sarvajc* 2000 SKQB 281, 194 Sask. R. 249, [2000] 8 W.W.R. 74 (Sask QB) paras 10-14. *Caveat Emptor* would continue to apply with respect to the sale of specific goods where the buyer had a chance to inspect the goods before purchase and is deemed to have accepted the goods subject to such defects as his examinations should have revealed: Jacob S. Ziegel & Anthony J. Duggan, *Commercial and Consumer Sales Transactions, Cases, Text and Materials*, 4th ed. (Toronto: Edmond Montgomery publications limited, 2002) at 192.

⁴⁰ *QCPA*, *supra* note 18, ss 261, 262; *SCPA*, *supra* note 33, s 44 (1); *NBCPWLA*, *supra* note 33, s 24, however in limited circumstances, it can be limited by contract, unless “it would not be fair or reasonable to allow reliance on such agreement.”: *Ibid*, s 25. *QCPA*, *supra* note 18, s 9(3); British Columbia *Sale of Goods Act*, RSBC 1996 c.410 [BCSGA] ss 18, 20; Nova Scotia *Consumer Protection Act* RSNS 1989 c. 92 [NSCPA], 26 (3) d) and f); Manitoba *Consumer Protection Act*, RSM 1987, c. C200, CCSM c. C200

copies of copyright works online. The transaction of these copies is almost invariably accompanied by extensive non- negotiated terms and conditions that can easily alter and even negate the application of the statutory implied obligations.⁴¹ Without their mandatory nature, statutory implied obligations could be seriously undermined in the online environment.

Typically, statutory implied obligations can be rebutted only by the circumstances that are specifically listed in the applicable statutory provisions.⁴² Consumers bear the burden of proof that the implied obligations have been breached, on a balance of probabilities.⁴³ The remedies available for breach of an implied obligation include specific performance, damages (i.e., exemplary or punitive damages), and rescission of contract,⁴⁴ and may vary based on the nature of the implied obligation and the nature of the breach.⁴⁵ Although these remedies may be of limited appeal to the individual consumer of commercial copies of copyright works, I am particularly interested in how these remedies can shape copyright distributors' business practices as a preventive measure to potential class action lawsuits.

As I discuss further below in the present Part of this chapter, there is a relatively high degree of discrepancy among the statutory implied obligations of quality and fitness for purpose across the various jurisdictions in Canada.⁴⁶ By contrast, the statutory language of implied obligations of

[MCPA], s 58(1); North Western Territories *Consumer Protection Act*, RSNWT 1988, c.C-17 [NWTCPA] s 70(1).

⁴¹ See Chapter 3 Part III C.

⁴² For example, the statutory implied obligation of quality will not apply to defects specifically brought to the attention of the purchaser before the sale took place. Or the implied warranty of title will not apply with respect to facts that are specifically brought to the attention of the purchaser and that she agrees to assume: See discussion below in Part II A of this Chapter. For the application of these exceptions, see for example: *Yarechewski v Stadium Ford Sales (1980) Ltd.* (1990) 68 Man. R. (2d) 217 (MQB); *Martel v Siman* (2002) SKPC 74 (SPC). Further, the implied obligations of quality will not apply if it is established that the purchaser made abusive use of the good.

⁴³ The burden of proof is to establish, on a balance of probabilities that there was a defect in workmanship or defect in the product: *Pioneer Grain Co. v Ortynsky* (2009) SKQB 513 at para 57.

⁴⁴ See for example, Ontario *Sale of Goods Act*, RSO 1990, c. S-1 [OSGA], ss 51- 52; *OCPA*, *supra* note 18, s 100; *QCPA*, *supra* note 18, art. 272; *SCPA*, *supra* note 33, s 57. EC, *Parliament and Council Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees* [1999] OJL 171/07 at 12 [*Directive 1999/44/EC*], at art 3, lists the remedies available to consumers for goods that do not conform to the contract. They include: repair or replacement, reduction in the price, rescission of contract. Similar remedies apply in the UK *Sale of Goods Act 1979* (U.K.), 1979, c. 54 [UKSGA], s 48.

⁴⁵ See *supra* note 33 and 34.

⁴⁶ See the discussion below in Part III A (i) of this chapter.

conformity to the description and of title and of quiet possession is more uniform across Canada,⁴⁷ with the important caveat that in some provinces they can be overridden by contract.⁴⁸ It is, therefore, difficult to find a uniform view across Canada with respect to the application of implied obligations of quality and fitness for purposes to protect consumers of commercial copies of copyright works. The distinctions between the applicable regimes in the various provinces need to be borne in mind as I review the statutory implied obligations of fitness for purpose and of quality, which I discuss next.

A. Statutory implied obligations of quality and of fitness for purpose

In theory, requirements of “fitness for purpose” may appear to address a broader range of the *prima facie* open-ended uses and privileges that stem from the ownership in goods, including in copies of copyright works, than do obligations of “quality”. The queries for consumers of copyright works that I investigate here are not related to the intrinsic quality of the CD, such as its breakability or durability, or the musical or visual quality of the embedded recording. Such cases are no different from instances involving other defective consumer products and would receive a similar treatment.⁴⁹ The present field of study revolves around a broader range of expectations, including of usages (or “purposes”) that consumers have when they buy music CDs, film DVDs, or download a musical recording or film from the Internet. An additional layer of complexity is added here because of the application of copyright law, which is not present for other consumer goods. The issues to clarify include the scope of usage and freedoms that inure to the benefit of consumers as owners of the copies. How many reproductions, if any, can consumers make of the copyright works, and for what purposes? Can they lend or transfer the copies and, if so, to whom? Can they telecommunicate them via the Internet to others? Can they modify the copyright works contained in the copies, and play the copies on any devices, anywhere in the world, and for an unlimited period of time? How can consumer law provide

⁴⁷ E.g. See *OSGA*, *supra* note 44, s 13(b); *SCPA*, *supra* note 33, s 48(b) (ii); *NBCPWL*, *supra* note 33, s 8(1) c; *MCPA* *supra* note 114, s 58(1) b); *BCSGA*, *supra* note 114, s 16(b), *NSCPA*, *supra* note 40, s 26(3) b); *NWTCPA*, *supra* note 40, s 70 (1) (b); *ASGA*, *supra* note 36, s 14(b); *NLSGA*, *supra* note 36, s 14(b); *PEISGA*, *supra* note 36, s 14(b).

⁴⁸ *ASGA*, *supra* note 36, ss 15-16; *NLSGA*, *supra* note 36, ss 15(1), 16 c) and e); *PEISGA*, *supra* note 36, ss 15, 16 b) and c).

⁴⁹ As I discuss in Chapter 8, such copies of copyright works, as embedded in physical objects would generally be treated as goods under sale of goods and consumer law and their resistance, quality of recording raise issues that are not distinct of commercial copies of copyright works but are rather similar to other forms of goods.

different answers to these questions than the ones provided by Canada's *Copyright Act* [CCA]⁵⁰ or similar copyright statutes in other jurisdictions? This is the primary purpose of the present analysis.

In practice, the literal meaning of "purpose" and "quality," the statutory language employed to describe each implied obligation (i.e., of fitness for purpose and of quality) and their interpretation by case law,⁵¹ lead to fewer distinctions between "purpose" and "quality" than would appear at first sight. Implied obligations of fitness for purpose tend to be interwoven or assimilated into issues of quality, and in some jurisdictions more than in others.⁵² In that context, statutory implied obligations of quality and of fitness for purpose are analyzed jointly, while I emphasize any distinctive features between the two where applicable.

The literal meaning of "purpose" points to "the reason for which something is done or made, or for which it exists."⁵³ "Quality" refers to "the standard of something when compared to other things like it," or, in its second meaning, "a distinctive, ... attribute or characteristic."⁵⁴ The notion of a grading, or a standard scale is intimately associated with the first meaning of quality, as a means to compare one product from the others.⁵⁵ "Purpose" requires a different exercise that involves asking whether the product is set to do what it was supposed to do, and sometimes the exercise is independent of a grading scale to assess one product compared to the others. A failure of quality⁵⁶ usually infers a malfunction, an anomaly, or a departure from a standard production point of reference, or a deceit in

⁵⁰ RSC 1985, c. C-42.

⁵¹ For instance, there is often an overlap between the statutory implied obligations of fitness for a particular purpose and the ones of merchantable quality: see the discussion below in Part II A of this chapter. See also Gerald H.L. Fridman, *Sale of Goods in Canada*, 5th ed. (Toronto: Thomson Carswell, 2004) at 169; Ziegel & Duggan, *supra* note 39 at 285ff.

⁵² This is the case in the province of Québec, where the warranties of durability and of fitness for purpose are often described as being warranties of quality. In the Canadian common law jurisdictions where implied obligations of merchantable quality co-exist with implied obligations of fitness for a particular purpose specifically brought to the attention of the seller, their interpretation by the courts engender significant overlap between two seemingly distinct implied obligations. See the discussion further below in that section. The *US UCC*, *supra* note 12, § 2-314 on the implied obligation of merchantability specifies that it requires that goods be "fit for the ordinary purposes for which goods of that description are used" *ibid* at para (c). *UKSGA*, *supra* note 44, s 14 2B (a) specifically includes in the assessment of the quality of goods the "fitness for all the purposes for which goods of the kind in question are commonly supplied."

⁵³ "Purpose" as defined in the *Canadian Oxford Dictionary*, 2ed. (Toronto: Oxford University Press, 2004).

⁵⁴ "Quality" as defined in the *Canadian Oxford Dictionary*, *supra* note 53.

⁵⁵ The determination of the proper base of comparisons is to be assessed on a case by case basis based on surrounding circumstances: *Transport Jérobby inc. c. Techno Diesel inc.* (2009) CarswellQue 2315 (CQ) at para 29. The list of criteria (non-exhaustive) is, in some jurisdictions, explicitly stated in the statute that establishes the implied warranty: *SCPA*, *supra* note 33, s 48 and 39; *NBCPWL*, *supra* note 33, s 10(1) (a).

⁵⁶ More specifically, the first meaning of quality as defined above, *supra* note 54.

the “ranking” of the product, e.g., performance, durability, resistance. For its part, a failure of purpose also touches upon a different and arguably more complex array of situations than the defects that are present in issues of quality. It includes mistakes or deceit about the functions or characteristics of what the product is able to do. Quality issues also involve, to a certain extent questions of identity of the product, but they pertain to its “grade” or “ranking” rather than to the nature of the product.⁵⁷ While a highly defective quality in a product will usually engender a defect in the fitness for its purpose, the reverse is not necessarily true. In the first case, issues of fitness for purpose are easily assimilated to issues of quality. By contrast, the meaning of “purpose” suggests that issues of fitness for purpose go beyond issues of quality, at least in its first meaning.⁵⁸ Under a broader definition of “quality” that encompasses its second meaning, e.g., “a distinctive, ... attribute or characteristic,”⁵⁹ the differences between “purpose” and “quality” become more tenuous. On that basis, the questions raised on the permitted uses that consumers can make of commercial copies of copyright works relate to the “purpose” of these copies, but they can also be understood as attributes or characteristics that relate to “quality” in its secondary meaning.

The ability of obligations of quality or of fitness for purpose to ascertain consumers’ rights to copies of a copyright work may be, at least in theory, more likely in some provinces and territories than in others.⁶⁰ At one end of the spectrum, there are statutory warranties⁶¹ that embed consumers’

⁵⁷ On the same idea, Christian Twigg-Flesner, *Consumer Product Guarantees* (Aldershot, Hans: Ashgate Publishing Limited, 2003) at 5-6 refers to three types of quality defects: design defects, manufacturing defects and defects resulting from the way the good was handled during delivery. *Gagnon c. Entreprises Faucher & Guérin inc.*, 2008 CarswellQue 5631 (CQ) is also illustrative. In that case, the consumer had purchased a product on the basis of representations by the sellers that he would make energy savings between 25-30 %. It turned out that it cost him more in energy after installing the heating devices. The Court found that the sellers were in breach of their warranty of fitness for the purpose for which the heating devices were intended under s 37 of the *QCPA*, *supra* note 18. In that case, the failing characteristics of heating devices can be characterized as an identity issue of the quality of the product based on the performance of the heating devices below the expected level, as well as of the fitness for the purpose for which such products are used, e.g. among others to make energy savings.

⁵⁸ E.g. “the standard of something when compared to other things like it,” *supra* note 54.

⁵⁹ “Quality” as defined in the *Canadian Oxford Dictionary*, *supra* note 53 and note 54.

⁶⁰ I.e. whereby the implied obligations of quality or of fitness for a particular purpose are specifically invoked against copyright holders’ restrictive terms of uses. French cases dealt specifically with those issues: see *supra* note 12. Implied obligations are invoked quite frequently regarding the sale of computer systems, which would involve hardware and software (i.e. copies of copyright works) but would typically involve malfunctions of the system rather than restrictive terms of use: see *infra* note 97. Also, the restrictiveness of some obligations is in some cases compensated by the liberal interpretation that courts have given to their application to the benefit of buyers and consumers. See the discussion further below in Part II A of this chapter, particularly with respect to implied obligations of fitness for a particular purpose.

reasonable expectations with respect to “acceptable quality” or “satisfactory quality,”⁶² or with respect to a “purpose for which goods of that kind are ordinarily used,”⁶³ as the legal test to establish the application of the statutory warranties. They establish minimum expectations, on a case-by-case basis with respect to the product from the perspective of the consumer,⁶⁴ that are based on a non-exclusive list of factors⁶⁵ that are not solely dictated by the terms of the contract, but that can also take into account external factors.⁶⁶ They cannot be overridden by contract⁶⁷ and can only be limited in specific

⁶¹ Within that group, some of the warranties are implied, which means that they can be set aside if the implication is not founded: this is the case of Saskatchewan (*SCPA*, *supra* note 33, s 48) and in New Brunswick (*NBCPWL*, *supra* note 33, s 10(1)). In Québec, *QCPA*, *supra* note 18, art. 37, 38, durability and fitness for purpose are required and the statute does not provide for statutory exceptions to this requirement.

⁶² *SCPA*, *supra* note 33, s 48 (d) and 39 (a) provide a statutory warranty that goods sold by a retailer are of “acceptable quality” which is defined as “the characteristics and the quality of a consumer product that consumers can reasonably expect the product to have, [emphasis added] having regard to all the relevant circumstances of the sale of the product, including: (i) the description of the product; (ii) its purchase price; and (iii) the express warranties of the retail seller or manufacturer of the product; and includes merchantable quality within the meaning of *The Sale of Goods Act*”; see also the *UKSGA*, *supra* note 44, ss 14 (2); the *Supply of Goods and Services Act* 1982 (U.K.), 1982, c. 29 [UKSGSA], s 4(2); Liability for breach of implied obligations under the *UKSGA*, *supra* note 44, cannot be excluded in consumer agreements against consumers and any such term is void as against consumers: *UKSGA*, *supra* note 44, ss 6, 20.

⁶³ *QCPA*, *supra* note 18, s 37; *NBCPWL*, *supra* note 33, s 10 (1) (a) further clarifies that such purpose is determined having regard to a list of named circumstances and all surrounding circumstances pertinent to the sale.

⁶⁴ The *SCPA*, *supra* note 33, ss 48 (d), 39 provide a statutory implied warranty of acceptable quality, i.e. “the characteristics and the quality of a consumer product that consumers can reasonably expect the product to have...”; The *NBCPWL*, *supra* note 33, s 10 (1) (a) states “as it is reasonable to expect.”, For the a discussion on the application of the *QCPA*, *supra* note 18, see Nicole L’Heureux, *Droit de la consommation*, 5^e édition (Cowansville, Qc: Yvon Blais, 2000), at 63, 69, 71.

⁶⁵ For example, the price, the description of the product, the existence of express warranties, the conditions of their use: *QCPA*, *supra* note 18, s 38; *SCPA*, *supra* note 33, i.e. the implied warranty of “acceptable quality”; *NBCPWL*, *supra* note 33, s 10 (1) (a). *Beaulieu v Leisure Time Sales Ltd* 1993 CarswellNB 142 138 N.B.R. (2d) 215, 354 A.P.R. 215 (NBQB). A good illustration on how these criteria, including the price are applied on a case by case basis is the decision: *Zarubin v Yorkton Carpet Land Ltd.* 1990 CarswellSask 379 (SQB). In that case, the court commented as follows on the effect of a bargain price for carpet which turned out to be defective shortly after its purchase (paras 20-22): “Price is one of the considerations in the durability warranty. But, price must be considered in the context of the transaction and, in particular, the direct representations made by the salesman who attended the premises and observed the purposes for which it was to be installed. ... You cannot say that it is worth \$24.95 but is a bargain at \$13.75, and then defend the lack of durability on the basis that it was only worth \$13.75.” *Anderson v Auto Clearing (1992) Ltd.* (2010) CarswellSask 734 (SPC), involved the purchase of a used car with considerable mileage. The court nevertheless found that a breakdown within one year of purchase was a breach of the statutory implied warranty of “acceptable quality” under the *SCPA*, *supra* note 33.

⁶⁶ *Ibid.* The factors to be taken into account to assess the application of these statutory implied warranties’ are not exhaustive.

⁶⁷ *QCPA*, *supra*, note 11, ss 261, 262; *SCPA*, *supra* note 33, s 44 (1); *NBCPWL*, *supra* note 33, s 24, however in limited circumstances, it can be limited by contract, unless “it would not be fair or reasonable to allow reliance on such agreement.”: *Ibid.*, s 25.

circumstances.⁶⁸ They alter the traditional contract law of implied terms and reasonable expectation by focusing on the perspective of the consumer, rather than implying terms for the benefit of both parties.⁶⁹ The substitution of traditional contract law principles of interpretation is consistent with the underlying objectives of consumer law to rectify the detrimental effects of the asymmetries that exist between the supplier and the consumer.⁷⁰ In that context, general contractual terms that state that the product is sold as it is (which could have been interpreted as one of the circumstances to take into account when establishing the scope of the statutory implied obligations, e.g., a notice to the consumer to be more diligent before she performs her purchase) are often held by the courts to be of no legal effect.⁷¹ Typically, they do not *a priori* negate the application of the statutory implied obligations of fitness for purpose or of quality.⁷²

⁶⁸ *SCPA*, *supra* note 33, s 48 (d) provides that the implied warranty of acceptable quality does not apply: (i) respecting defects specifically drawn to the consumer's attention before the contract is made; or (ii) where the consumer examines the product before the contract is made, respecting defects that examination ought to have revealed. These exceptions were applied in: *Martel v Siman*, 2002 SKPC 74. See also *NBCPWL*, *supra* note 33, section 10(2). There is no specific exclusionary language in the *QCPA*, *supra*, note 11. However, courts have tended to assimilate statutory warranties of fitness for purpose and of durability in sections 37 and 38 of that Act as warranties against latent defects, which brings a similar legal analysis with respect to whether the defect had been disclosed to the buyer: see the discussion further below in Part II A of this chapter. For a narrow interpretation of statutory warranty of fitness for purpose (*QCPA*, *supra* note 18, art 37) see: *Boivin c. Honda Canada inc.* (2000) CarswellQue 2741 (CQ) where the court found that this warranty had not been breached by a recreational vehicle sold without a side mirror and without rear breaking lights. The recreational vehicle could still be used for a purpose for which it was intended (i.e. on properties where there was no road safety requirement to have such features).

⁶⁹ The doctrine of implied terms is applied and justified on the basis of transaction efficiency: Waddams, *supra* note 34 at para 146. For a comparative law analysis on the doctrine of reasonable expectation in contract law in the context of information technology agreements, see Clarisse Girot, *User protection in IT Contracts: A comparative study on the protection of the user against defective performance in information technology* (The Hague: Kluwer Law International, 2001) at 33-51. On the concept of "reasonableness" as contrasted with "good faith", Swan, *supra* note 32 at 698-699 notes: "If good faith focuses principally on honesty and fairness, reasonableness focuses on rationality or the absence of subjective whim. Reasonableness connotes the ability to give reasons, to defend rationally an action or a decision. Reasonableness may require the party subject to that standard to have regard to the other party's interests."

⁷⁰ L'Heureux, *supra* note 64 at 53ff.

⁷¹ *MacLeod v Ens*, [1982] 3 W.W.R. 653, 15 Sask. R. 73, 135 D.L.R. (3d) 365 (CA), *Radul v Daudrich* (1983) CarswellMan 135 [1983] 6 W.W.R. 278 (MCA) where the court held that a statement to the effect that a good was not of a merchantable quality and sold "as is" did not fulfill the statement of quality that could limit the application of the statutory warranties under the Manitoba's Consumer protection Act.; *Theriault c. Roy* (1990) CarswellNB 169 109 N.B.R. (2d) 75, 273 A.P.R. 75 (QB) where the court held that a sale "as is" did not remove the implied warranty of quality and durability; see also *Munro v Central Auto Sales Ltd.* 1994 (1997) CarswellSask 798 (SPC); *Parsons c. Mont-Bleu Ford inc.* 2002 CarswellQue 2932 (CQ); *Adams v J & D's Used Cars Ltd.* (1983) CarswellSask 311 (QB) which involved a case where the implied statutory warranty of fitness for a particular purpose applied, given that plaintiff had specifically brought that purpose of the car to the attention of the vendor. The reference to a sale "as is" was of no legal effect for the application of the warranty.

⁷² *Ibid.*

At the other end of the spectrum, some provinces provide statutory implied obligations of merchantable quality and fitness for a particular purpose that is brought to the attention of the seller; those obligations are imported from sale of goods law into consumer law and can be overridden by contract.⁷³ They are less favourable to consumers because of the narrower scope of “merchantable quality,” because of a focus on both parties and not the consumer in the assessment of “merchantable quality,” and because they can be set aside by (standard non-negotiated) contract. The scope of application of implied obligations of quality and fitness for a particular purpose under the *US UCC*⁷⁴ generally falls into that category.⁷⁵

In the middle of the spectrum, similar implied obligations of quality and fitness for a particular purpose become mandatory in consumer transactions.⁷⁶ The implied obligation that goods are of a “merchantable quality” only applies to goods sold by description,⁷⁷ which sales of copies of musical

⁷³ *ASGA*, *supra* note 36, ss 15 and 16; *NLSGA*, *supra* note 36, ss 15(1), 16 c) and e); *PEISGA*, *supra* note 36, ss 15, 16 b) and c). To illustrate the impact of narrower statutory implied obligations of quality and of fitness for a particular purpose that can be overridden by contract, in *Moldenhauer v Alberta Powersports Inc.*, (2009) 2009 ABPC 118, the Alberta Provincial Court ruled that the sale of a bicycle to a consumer “as is” for the amount of \$5,000.00 that soon thereafter turned out to have serious defects, precluded the application of the *ASGA*, *supra* note 36. “As is” signified to the consumer that he should have been more vigilant when he made the purchase.

⁷⁴ *Supra* note 12.

⁷⁵ *US UCC*, *supra* note 3, § 2-314 & § 2-315. They fit within this category of the spectrum of implied obligations of quality and fitness for purpose primarily because they can be overridden by contract.

⁷⁶ *OSGA*, *supra* note 44, ss 14 and 15, provide that in a sale by description (i.e. goods that cannot be inspected upon purchase) there is an implied condition that the goods are of a merchantable quality. Section 15.1 limits the applicability of an implied condition of fitness for a particular purpose to those cases “where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller’s skill or judgment, and the goods are of a description that it is in the course of the seller’s business to supply (whether the seller is the manufacturer or not)” then in those cases, an implied condition that the goods will be reasonably fit for such purpose will apply. Section 15 further provides “that an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.” These implied obligations cannot be overridden by contract: *OSGA*, *supra* note 18, s 9(3). British-Columbia and Nova Scotia provide a similar legal regime: *BCSGA*, *supra* note 40, ss 18, 20, and *NSCPA*, *supra* note 40, s 26 (3) d) and f). There are subtle variations to that model, e.g. the fact that the warranty or condition of merchantability applies to all sales and not just to sales by description: *NSCPA*, *supra* note 40, s 58(1); *NWTCPA*, *supra* note 40, s 70(1) e) and h). For the purpose of our discussion on the applicability of these implied obligations to copies of copyright works, these distinctions do not make a great difference in practice, given that copies of copyright work are likely to qualify as sales by description in most cases.

⁷⁷ This is the case in *The OSGA*, *supra* note 44, s 15(2); *BCSGA*, *supra* note 40, s 18(6); *ASGA*, *supra* note 36, s 16(4); *NLSGA*, *supra* note 36, s 6 (c); *PEISGA*, *supra* note 36, s 16(b), *NSCPA*, *supra* note 40, s 3(f) as well as a general implied condition of merchantable quality applicable to all goods, *ibid*, s 3 (h).

recordings or of films would generally be.⁷⁸ “Merchantable quality” is a narrower concept than the “acceptable quality” or “satisfactory quality” standard of some jurisdictions discussed above.⁷⁹ For instance, if the goods have many functions, they need to fulfill at least one of the functions to be of a merchantable quality.⁸⁰ In *Gordon Campbell Ltd. v Metro Transit Operating Co.*,⁸¹ the Supreme Court of British Columbia held that goods had to be fit for use in some manner in which goods of the same quality and general character were ordinarily used.⁸² Goods with a defect (e.g., contaminated feed) have been held to be of a merchantable quality because there was evidence that some buyers were willing to buy such goods under that description.⁸³

⁷⁸ “Goods sold by description” has been held to apply to: “all cases where the purchaser has not seen the goods, but is relying on the description alone”: *Varley v Whipp* [1900] 1 QB 513, 69 LJQB 333. Courts have given it a broad meaning. In *Shandloff v City Dairy Ltd. and Moscoe*, [1936] 4 D.L.R. 712, [1936] O.R. 579, 1936 (OCA), the Court of Appeal of Ontario held that dairy products, which by their nature could not be inspected by the purchaser upon their purchase, constituted goods by description. See also Fridman, *supra* note 51 at 165. See also *Grant v Australian Knitting Mills Ltd* [1936] A.C. 85 at 100, per Lord Wright: “It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g. woollen undergarments, a hot-water bottle, a second-hand reaping machine, to select a few obvious illustrations.”

⁷⁹ A.G. Guest, (gen. ed.) *Benjamin's Sale of Goods*, 7th ed. (London: Sweet & Maxwell, 2006) [*Benjamin's Sale of Goods*, 7th ed.] at para 11-031.

⁸⁰ This is how Lord Reid interpreted the scope of the implied condition of merchantable quality in *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers association* [1969] 2 AC 31, [1968] 2 All ER 444 (HL): “...if the description was so general that goods sold under it are normally used for several purposes, then goods are merchantable under that description if they are fit for any one of these purposes: if the buyer wanted the goods for one of those several purposes for which the goods delivered did not happen to be suitable, though they were suitable for other purposes for which goods bought under that description are normally bought, then he cannot complain.”; see also *Gordon Campbell Ltd. v Metro Transit Operating Co.* (1983) 23 B.L.R. 177 (BCSC); *Brown & Son Ltd. v Craiks Ltd.* [1970] 1 WLR 752, [1970] 1 All ER 823 (H.L.). In that case, the House of Lords held that clothes that could be used for industrial purposes were of a merchantable quality even if they did not meet the purpose of the buyer which was to use them for dresses. In *Villeseche v Total North Communication Ltd.*, *supra* note 36, the Yukon Court of Appeal upheld the lower court judgment that the *Sale of Goods Act*, RSYT 1986-1990, implied obligation of merchantability applied to a computer system. In that case, there was an immediate failure of the computer software to mount automatically, a significant function of the equipment.

⁸¹ *Supra* note 80.

⁸² *Ibid.* However, in *Edmonton (City) v Lovat Tunnel Equipment Inc.*, 2000 CarswellAlta 1394 (QB), the Alberta Court of Queen's Bench held that the Defendant had breached the implied warranty of merchantable quality under *ASGA*, *supra* note 36, by providing equipment that was only apt in limited cases and not others. For a narrow interpretation of the statutory warranty of fitness for purpose in the seemingly more generous jurisdictions of implied obligations of fitness for purpose, e.g. under art. 37 of *QCPA*, *supra* note 18, see: *Boivin c. Honda Canada inc.*, *supra* note 68.

⁸³ *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers association*, *supra* note 80 (per Lord Reid).

The statutory implied obligation that goods (sold under description)⁸⁴ are of a “merchantable quality”⁸⁵ and the related case law are a good illustration of how the concept of quality is intimately related to the notion of purpose. In *Cammell Laird and Company, Limited v The Manganese Bronze and Brass Company, Limited*,⁸⁶ Lord Wright stated that “merchantable quality” means that “the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description.”⁸⁷ This is the category of cases where the quality of a good is so defective that it cannot fulfill any of its intended purposes.⁸⁸ In such circumstances, the link between quality and lack of fitness for purpose should come as no surprise. In other cases, the failure to meet legal standards (such as road safety) has been held to be a breach of the implied obligations of fitness for purpose and of quality.⁸⁹ This is particularly relevant to the application of implied obligations of quality and fitness for purpose to copies of copyright works.⁹⁰

The statutory implied obligation of merchantable quality does not apply if the defect was disclosed to the purchaser,⁹¹ or if the purchaser had a chance to inspect the goods and such an inspection ought to have revealed the existence of the defect.⁹² Could non-negotiated standard end-user agreements that explicitly limit the forms of usages and that restrict the devices on which e-books, musical recordings or films can be played amount to a disclosure of the “defect”⁹³ or be one that the consumer ought to

⁸⁴ In many jurisdictions, the implied obligation of merchantable quality applies to goods sold under description. See the discussion below in Part II B of this chapter on the statutory implied obligations of correspondence with description. In other provinces or territories, it applies indiscriminately to all sales of goods.

⁸⁵ ““Quality of goods” includes their state or condition”: *OSGA*, *supra* note 44, s 1.1.

⁸⁶ *Cammell Laird and Company, Limited v The Manganese Bronze and Brass Company, Limited* [1934] A.C. 402 at 430 (HL).

⁸⁷ *Ibid.*

⁸⁸ See the previous discussion in this section on the various literal meanings of “quality” and “purpose”, and *supra*, note 53 and 54.

⁸⁹ *Taylor v JPK Enterprises Ltd.* (2001) CarswellMan 229 (QB).

⁹⁰ The link between products not complying with laws and implied obligations is even more explicit with respect to implied obligations of title and quiet possession, as this is discussed in Part II C of this chapter below. See also the discussion on the possible application of this case law on implied obligations in Chapter 11.

⁹¹ If however the defect disclosed is such that it renders the good unusable, the disclosure will not relieve the seller from the implied condition that goods are of a merchantable quality. For example, see *Green v Jo-Ann Accessory Shop Ltd.* *Green v Jo-Ann Accessory Shop Ltd. and Baker* (1983) CarswellMan 309, 21 Man. R. (2d) 261 (CC), whereby the court held that a “no ironing label” on a dress that needed ironing and that was damaged after ironing, amounted to a breach of the statutory implied condition of merchantable quality.

⁹² *OSGA*, *supra* note 44, s 15(2); *BCSGA*, *supra* note 40, s 18(b), *NSCPA*, *supra* note 40, s 26(f); *PEISGA*, *supra* note 36, s 16(b); *NLSGA*, *supra* note 36, s 16 (d).

⁹³ If one were to assume that the restricted usage would be qualified as such by the consumer-claimant.

have identified after a reasonable inspection? Could these non-negotiated standard end-user agreements allow the musical recording or film distributor to avoid the application of implied obligations of merchantable quality to the restrictive terms of use and of devices? Because statutory implied obligations of merchantable quality are designed narrowly around whether the defect was latent or not, the presence of restrictive terms in standard terms and condition could rather point to the description of the product and establish that the restrictive terms are therefore not a defect. In contrast, the more generous statutory implied obligations that set minimum standards based on consumers' reasonable expectations rely on the contract terms as one among many factors to assess whether the statutory implied warranty was breached.⁹⁴ The presence of restrictive terms in the non-negotiated standard end-user agreements are more likely associated to the description of the product (one of the factors to consider to decide whether consumers' reasonable expectations were met or not)⁹⁵ rather than as a defect which typically is a derogation from the norm.

The jurisdictions with the narrower statutory implied obligations of merchantable quality also have a statutory implied obligation of fitness for *a particular* purpose, as do other jurisdictions.⁹⁶ The statutory implied obligation of fitness for a particular purpose relates to a purpose specifically (or by implication) brought to the attention of the seller and a reliance on her skill and judgment by the buyer.⁹⁷ This statutory implied obligation of fitness for a particular purpose is distinct from the one of

⁹⁴ See the discussion in this Part II A of this chapter on the other end of the spectrum.

⁹⁵ For example see *SCPA*, *supra* note 33, s 39.

⁹⁶ This is the case of Saskatchewan, *SCPA*, *supra* note 33, s 48(e).

⁹⁷ See the *OSGA*, *supra* note 44, s 15.1; *MCPA*, *supra* note 40, s 58(1); *BCSGA*, *supra* note 40, s 18(a) ; *NWTCPA*, *supra* note 40, s 70(1) h; *NSCPA*, *supra* note 40, s 26(3) (e), *ASGA*, *supra* note 36, s 16(2), *NLSGA*, *supra* note 36, s 16 (a); *PEISGA*, *supra* note 36, s 16(a). In *J.P. Enterprises Inc. v Daimler Chrysler Canada Inc.* (2010) CarswellSask 604 (QB) stated that there are three requirements for the warranty to apply, citing G.H.L. Fridman in *Sale of Goods in Canada*, 4th ed. (Toronto: Carswell, 1995) at 186: (i) that the contract be in the course of the seller's business; (ii) that the seller have knowledge of the purpose of the goods; (iii) and that the buyer rely on the seller's skill or judgment. Of those three requirements, the first one excludes private sales and will generally apply to consumer transactions of copies of copyright works. In *Gerber Scientific Instrument Co. v Bell-Northern Research Ltd.*, *supra* note 36, the Ontario Court of Appeal upheld the lower court judgement finding that the supply of a computer system was in breach of the implied obligation of fitness for a particular purpose under s 15 of *OSGA*, *supra* note 44, and that this breach went to the root of the contract and entitled appellant to rescind agreement; In *Lalese Enterprises Inc. v Arete Technologies Inc.*, *supra* note 36, the implied condition of fitness for a particular purpose was held to apply to a customized computer system (hardware and software). *W.J. Caul Funeral Home Ltd. v Pearce*, *supra* note 36, the Newfoundland Superior Court (TD) applied the implied condition of fitness for a particular purpose under *NLSGA*, *supra* note 36, to computer software and hardware. In that case there had been several interactions with the supplier so that the conditions for the application of this implied condition were met. In *Michael's Pizzeria Ltd. v LP Computer Solutions Inc.*, *supra* note 36, the court also found that the implied condition of fitness for a particular purpose applied to a

“merchantable quality” in at least two respects.⁹⁸ In practice, courts have broadly interpreted the requirements of the statutory implied obligation of fitness for a particular purpose.⁹⁹

Commentators often point to an overlap between the statutory implied obligations of fitness for a particular purpose and the ones of merchantable quality.¹⁰⁰ However, an interpretation based on the ordinary meaning of the statutory implied obligation of fitness for a particular purpose would call for, *inter alia*, some form of interaction between the buyer and the seller at the time of the transaction.¹⁰¹ Given the mass market for copies of copyright works, such as musical recordings and films, and the absence in most, if not all cases, of interaction between the consumer and the seller or distributor, especially in the case of online transactions, it seems that even the most generous interpretation of this

computer system but that in that case it had not been breached. This case also involved extensive interaction between supplier and buyer.

⁹⁸ First, the effect of the statutory implied obligation of fitness for a particular purpose allows the consumer to bring evidence external to the contract that can negate written contractual terms. This is an exception to the parol evidence rule. In jurisdictions where the entire implied obligation can be overridden by contract (e.g. Alberta, Prince Edward Island, Newfoundland & Labrador) contracts that successfully discard the application of the statutory implied obligations would govern the obligations of the parties. Second, by relying on the seller’s skill or judgment, the buyer is not constrained by the limits of the application of the statutory implied obligation of merchantable quality, e.g., with respect to defects that a normal examination would have revealed: *Frechette v Charles Lage Piano Co.* 2006 MBQB 99; *Blondeau v Cheyenne Chev-Olds Ltd.* (2001) CarswellSask 777 (SPC).

⁹⁹ Fridman, *supra* note 51 at 170ff. See *Paskiman v Meadow Ford Sales Ltd.* (1983) CarswellSask 425, (SQB) at para 6. See also: *Harnet v Techtronics Holdings Canada Ltd.* (2002) SKPC 70 at para 8: “It is common knowledge amounting to a “usage of the trade”, that when a customer makes known to the computer seller, what the customer needs a computer to produce, and relies upon the seller to supply the same, the customer is not simply purchasing, and the seller is not simply selling a piece of machinery. Rather, they are contracting for the purchase and sale of a system or process that will produce the desired “needs””.

¹⁰⁰ Fridman, *supra* note 51 at 169; Ziegel & Duggan, *supra* note 39 at 285; see Benjamin’s Sale of Goods, *supra* note 79 at para 11-025, for an explanation of this overlap based on a historical interpretation of “merchantable quality”, i.e. that in the earlier case law around the interpretation of the implied obligation of “fitness for a particular purpose”, this implied obligation was more frequently invoked because of doubt around what was a sale by description and around concept of “merchantability”.

¹⁰¹ *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Association*, *supra* note 95, where Lord Pearce elaborated on the meaning of a “particular purpose”: “...a particular purpose means a given purpose, known or communicated.” For example, a purchaser bringing to the attention of the vendor that they have a dog upon purchase of flooring which starts off peeling off two months after purchase and is judged to be a breach of the implied warranty of fitness for a particular purpose brought to the attention of the seller: *Day v 465450 B.C. Ltd.* (2009) SKPC 103. See also *Hadland v North-East Recyclers Ltd* 2000 CarswellSask 633, [2000] S.J. No. 653 2000 (SPC), whereby the consumer purchasing replacement part for his car was ignorant about technical matters from which court inferred that it was reasonable that he would rely on the skills of the seller.

implied obligation would be of limited application to commercial (digital) copies of copyright works.¹⁰²

The statutory implied obligation of fitness for a particular purpose, even in its broader interpretation, remains narrow in its application and limited to exceptional cases (even more so in an online environment). It requires a positive act from the consumer (e.g., the act of making known to the seller a particular purpose or requirement)¹⁰³ and a reliance on the seller's skill or judgment. In the case of copies of copyright works, it is not inconceivable that such exceptional situation may occur.¹⁰⁴ Yet, it remains of limited application and interest from a consumer protection perspective. First, consumers may (legitimately) assume that certain attributes of the product are present without being inclined to ask specific questions, in which case it is not clear how they can invoke this implied obligation of fitness for a particular purpose, beyond being able to play it on at least one named device for an unlimited period of time.¹⁰⁵ Second, in the instances where consumers actively "make known to the seller" a specific purpose and are being turned away, they are left with no choice but to buy the music CD, film DVD, or download a copy, or to walk away from the transaction and have no ability to negotiate with sellers about the possible scope of use of the commercial copies of e-books, films, or musical recordings. Thus, in addition to addressing the exceptions rather than the rule of consumer transactions, even the exercise of that exception through specific inquiries by consumers to sellers is unlikely to favourably alter the permitted scope of use of commercial copies of e-books, films, or musical recording to meet consumers' reasonable expectations.

Across the spectrum of statutory implied obligations of fitness for purpose and of quality, there is little guidance offered on the distinction between "fitness for purpose" and "quality" and even "fitness

¹⁰² Benjamin's Sale of Goods, *supra* note 51 at para 14-010 points to the fact that the implied obligation of fitness for a particular purpose is less relevant in consumer contracts than the implied obligation of satisfactory quality on the basis that consumers are less likely to rely on sellers' judgment. In *PCM Technologies Inc. v O'Toole*, 2012 ONSC 2534 at para 31, the implied obligation of a fitness for a particular purpose was found to apply to a software where the plaintiff had specifically brought its needs to the attention of the seller.

¹⁰³ The "making known" does not however have to be express, it can be inferred.

¹⁰⁴ For example, when a purchaser makes enquiries about the possible uses of a musical recording or film with a sales representative online or at the retail store counter.

¹⁰⁵ For example, in *Scraba v Sharpe's Soil Services Ltd.* (2009) SKQB 49, the Saskatchewan Court of Queen's Bench held that there was no breach of the warranty of fitness for a particular purpose from the sale of a seed which was not resistant to a pesticide. In that case, the farmer Scraba had not made his particular purpose known to the seller, nor was there a duty to warn the purchaser of the seed's incompatibility with certain pesticides.

for a *particular* purpose.” The jurisprudence abounds with examples whereby “quality” and “fitness for purpose” are assimilated, and where little legal analysis is applied to distinguish one from the other.¹⁰⁶ In some instances, the particular set of facts giving rise to the claims justifies the assimilation of issues of quality with issues of lack of fitness for purpose. This is the case when the deficiency in the quality of the product is such that it renders it unfit to accomplish the purpose for which it was intended.¹⁰⁷

The blend of “fitness for purpose” with “quality” is particularly striking in the province of Québec where a statutory warranty of durability, having regard to a list of factors,¹⁰⁸ co-exists with a statutory warranty that the goods “must be fit for the purposes for which goods of that kind are ordinarily used.”¹⁰⁹ Both warranties are often described as “warranties of quality.”¹¹⁰ In the UK, the implied obligation that goods must be of a “satisfactory quality” may include “fitness for all the purposes for which goods of the kind in question are commonly supplied,” which assimilates “fitness for purpose” with requirements of quality.¹¹¹ Similarly, in the US, the (non-mandatory) implied obligation of merchantability is meant to include that the goods are “fit for the ordinary purposes for which goods of that description are used.”¹¹² In the US and the UK, this implied obligation co-exists with the traditional implied obligation of fitness for a *particular* purpose brought to the attention of the seller, an implied obligation that still exists in several common law jurisdictions of Canada.¹¹³

¹⁰⁶ For example, see: *Sumka v Manitoba Pool Elevators* [1976] W.W.D. 175 (MQB); *Morse v Cott Beverages West Ltd.*, 2001 SKQB 550, para 29. See also *Burnett v Autowheels in Motion Ltd.*, 2002 NSSM 7; *Cooper v Hickey* 2004 NSSM 29. See also Fridman, *supra* note 51 at 169.

¹⁰⁷ *Gagnon c. Entreprises Faucher & Guérin inc.*, *supra* note 57.

¹⁰⁸ *QCPA*, *supra* note 18, s 38 provides: “Goods forming the object of a contract must be durable in normal use for a reasonable length time, having regard to their price, the terms of the contract and the conditions of their use.”

¹⁰⁹ *QCPA*, *supra* note 18, s 37. The official version of the act, e.g. the French version, refers to “usage normal” which has a slightly different connotation than purpose for ordinary use of the English version.

¹¹⁰ *Desbiens c. Desmeules Automobiles Inc.* 1990 CarswellQue 1283 (CQ) at para 42. See also L’Heureux, *supra* note 64, at 68. In one case, the warranty of fitness for purpose has even been assimilated to the warranty of quality (durability), the former simply defining “normal use” in the latter: *Chouinard c. 9160-9495 Québec inc.* (2007) CarswellQue 11474 (CQ).

¹¹¹ *UKSGA*, *supra* note 44, s 14 (2). In France the statutory warranty of fitness for purpose is deemed to include legitimate expectations of quality flowing from suppliers’ representations: *Code de la Consommation*, art L211-5.

¹¹² *US UCC*, *supra* note 12, § 2-314 2 (c).

¹¹³ *UKSGA*, *supra* note 44, s 14 (3); *UKSGSA*, *supra* note 62, ss 4(4) and 4(5); *US UCC*, *supra* note 12, § 2-315. A similar statutory warranty of fitness for a particular purpose applies in France: *Code de la Consommation*, art. L211-5.

In some jurisdictions, the implied obligation of quality co-exists with one of fitness for purpose for which goods are normally used,¹¹⁴ and in others, with the additional implied obligation of fitness for a *particular* purpose.¹¹⁵ In the remainder and majority of jurisdictions examined here, the implied obligation of merchantable quality co-exists with the implied obligation of fitness for a *particular* purpose.¹¹⁶

In the common law jurisdictions, the two statutory implied obligations of quality and of fitness for a *particular* purpose are the codification¹¹⁷ of a long-standing tradition of addressing issues of “merchantable quality” and issues of “fitness for a particular purpose” separately.¹¹⁸ The ordinary meaning of each implied obligation, as well as their separate treatment through their statutory codification, suggest distinct meanings and scope for each implied obligation.¹¹⁹ While the implied obligation of quality includes that it must be fit for the purpose for which it is normally used, the implied obligation of fitness for a *particular* purpose must by implication refer to another category of purpose. The assimilation of “fitness for purpose” with “quality” can potentially narrow the application of implied obligations to a more limited scope of scenarios.

A consumer protection analysis of these implied obligations, which seeks to promote consumers’ *prima facie* open-ended privileges and powers as owners and users of goods, favours a meaning of

¹¹⁴ This is the case in New Brunswick: *NBCPWL*, *supra* note 33, s 10. 1 (a).

¹¹⁵ *Directive 1999/44/EC*, *supra* note 44, art 2 2. (b), (c), (d).

¹¹⁶ *Supra* note 97.

¹¹⁷ While the common law continues to prevail unless inconsistent with the express terms of the statute: for example, see *OSGA*, *supra* note 44, s 57(1), it is a codification not in the civil law sense: Michael G. Bridge, *Sale of Goods* (Toronto: Butterworths, 1988) at 3: “The Sale of Goods Act may not be a code in the sense understood by a civil law jurist, since it is confined to a special contract and permits penetration by the general law to fill its lacunae, but it can rightly be called a codification for the conscious attempt behind it to summarize rather than reform the antecedent case law.”; Fridman, *supra* note 51 at 158, refers to sale of goods law as containing provisions “to reproduce in statutory form the earlier common law developments as to conditions and warranties of description and quality in sales of specific goods, sales of goods by description, and sales by sample.”

¹¹⁸ Bridge, *supra* note 117 at 3.

¹¹⁹ The need to maintain two distinct applications of implied obligations of quality and fitness for a particular purpose is discussed in Lord Diplock’s dissenting reasons in *Ashington Piggeries Ltd. v Christopher Hill Ltd* [1972] AC 441 (HL).

“fitness for purpose” distinct from issues of quality that often tend to narrow the discussion about defective and non-defective goods.

Two French cases involved the application of warranties of quality to the scope of use by consumers of musical recordings through the purchase of CDs.¹²⁰ In both cases, the adequacy (or lack thereof) of the permitted scope of use of the purchased CD was analyzed under the latent defect rules of the French *Code Civil*.¹²¹ In *EMI France*,¹²² the Tribunal de Grande Instance de Nanterre held that a music CD functioning on some CD players but not on car CD players, as a result of technological protection measures restricting the use of the CD, constituted a latent defect that entitled the complainant to a rescission of the sale of the CD.¹²³ In arriving at this decision, the Tribunal took into consideration the fact that no such limitations existed on other CDs, as well as the fact that consumers were not notified of such restrictions.¹²⁴ In *Warner Music*,¹²⁵ the Tribunal of first instance ordered the rescission of the sale of CDs for digital music on the basis that the CD, which contained a technological measure, could not be used on a specific kind of laptop.¹²⁶ The CD contained a notification of the technological measure that stated that it could be read on most CD players and computers. The Tribunal held that this incompatibility with some computers constituted a latent defect under the French *Code Civil*.¹²⁷ The Court of Appeal reversed that order on the basis of a lack of evidence.¹²⁸

In Québec, there is a debate as to whether the statutory warranties of fitness for purpose and of durability are distinct from the general warranty against latent defects or if, rather, they are simply creating a presumption of the existence of such defects in favour of the consumer. Québec courts

¹²⁰ *EMI France*, *supra* note 12, and *Warner Music*, *supra* note 12.

¹²¹ Art 1641 C civ.

¹²² *Supra* note 12.

¹²³ *Ibid.* In addition to a named consumer claimant, there was also a consumer association as claimant. The latter's claims against EMI France and Auchan were dismissed on procedural grounds.

¹²⁴ *Ibid.* The CD had a notice to the effect that the CD contained a technological measure limiting the possibility to make copies.

¹²⁵ *Supra* note 12.

¹²⁶ *Ibid.*

¹²⁷ Article 1641 C civ.

¹²⁸ *Supra* note 12. Confirmed by Cour de cassation 1ère chambre civile 27 novembre 2008, *supra* note 12.

appear to be increasingly leaning toward the latter interpretation,¹²⁹ while earlier case law and academic commentators are inclined toward the former.¹³⁰

Sections 53 and 54 of the Québec *Consumer Protection Act* [*QCPA*]¹³¹ refer to consumers' remedies with respect to latent defects¹³² and with respect to the implied obligations of durability and of fitness for purpose respectively. This supports the interpretation that the implied obligations of durability and fitness for purpose impose obligations in consumer transactions that are distinct from the general regime of sellers' warranties of quality and against latent defects set out in the Civil Code of Québec. In effect, the increasingly prevailing tendency in Québec to assimilate the statutory implied obligations of fitness for purpose and of durability to warranties against latent defects limits the scope of both implied obligations, bringing the statutory warranties of durability and fitness for purpose closer to the narrower common law jurisdictions at the other end of the spectrum referred to above.¹³³

¹²⁹ *Martin c. Pierre St-Cyr Auto caravanes ltée* (2010) QCCA 420 at para 20; *L. (F.) c. Astrazeneca Pharmaceuticals PLC* (2010) CarswellQue 1023, J.E. 2010-675 (CS) at paras 77-78; *Moisan c. St-Casimir Autos Polaris inc.* (2008) CarswellQue 13455 (CQ); *Capitale, cie d'assurance générale c. Saturn-Isuzu de Trois-Rivières inc.* (2001) CarswellQue 2527 (CQ) at para 32. *Tinmouth v General Motors of Canada Ltd* [1988] R.J.Q. 1982 (CP); *Gadoury c. Solarium de Paris inc.* (2009) CarswellQue 5724, 2009 QCCQ 4993. In *Desbiens c. Desmeules Automobiles Inc.* (1990) CarswellQue 1283 (CQ) at para 46, the Court stated that for a breach of warranty to be found under art. 37 of the *QCPA*, *supra* note 18, the defect needed to be non-apparent. Although not explicitly making the link between the warranty of section 37 of the *QCPA*, *supra* note 18, in effect, this amounted to assimilating this statutory warranty to a warranty against latent defects. See also: Claude Masse, *Loi sur la protection du consommateur, analyse et commentaires* (Cowansville : Les Éditions Yvon Blais inc., 1999) at 259.

¹³⁰ *Létourneau c. Lafleche Auto ltée*. (1986) R.J.Q. 1956 (CS) at para 36; *Champagne c. Hyundai auto Canada Inc.* (1988) CarswellQue 1345 (CPQ) at paras 28-33; *Forest v Labrecque* (1990) J.E.90-1115 (CQ) at 8; and see also the more recent judgment: *Couture-Poulin c. Performance N.C. inc.*, 2012 QCCQ 1264, at para 30; Alain Olivier "Fitness for Purpose in the Contract of Lease under the Civil Code of Quebec" (1995) 40 McGill L.J. 187, at 217ff; Jeffrey Edwards, *La garantie de qualité du vendeur en droit québécois*, (Montreal: Wilson et Lafleur, 1998) at 163, 167. For her part, L'Heureux, without assimilating the statutory warranties of purpose for which the goods are normally provided and of durability to the warranty against latent defects, notes that they share a lot of similarity between them: L'Heureux, *supra* note 64 at 70. In *Larouche c. JVC Canada inc.* (2004) CarswellQue 5948 (CQ) the case involved a video camera which had a dysfunction in the way the tape was ejected, which appeared one year after the sale. Although technically, this could be qualified as a latent defect, the court invoked article 37 and 38 warranties of fitness for purpose and of durability, without assimilating these two provisions to remedies against latent defects in the CCQ or to section 53 of the *QCPA*, *supra* note 18.

¹³¹ *Supra* note 18.

¹³² Which refers to CCQ's general obligations of sellers with respect to the quality of property they sell (art 1726-1731). Article 53 of the *QCPA*, *supra* note 18, softens the rules for consumers by removing the application of the warranty against latent defects only if it could have been perceived from an ordinary inspection (the civil code discards the application of the warranty of apparent defects, i.e. "a defect that can be perceived by a prudent and diligent buyer without any need of expert assistance" (art. 1726 CCQ).

¹³³ As outlined above in this Part II A, one end of the spectrum offers representations and warranties that are seemingly more generous to consumers while the other end offers more restrictive ones that can be

It does so, first, by assimilating them to issues of quality (in the first meaning as discussed above)¹³⁴ and, second, by narrowing their application to whether there exists a defect, whether it was present at the time of the sale, and whether it was known to the purchaser or could have been known by an ordinary examination.¹³⁵ While a latent defect will often involve an issue of quality (durability) or lack of fitness for purpose¹³⁶ – the reverse is not necessarily true.

The legal framework of latent defects¹³⁷ narrows the discussion between defective and non-defective products,¹³⁸ – while the warranties of durability and fitness for purpose rely more generally on consumers’ reasonable expectations – to determine whether such warranties were breached, with or without the existence of a defect *per se*.¹³⁹ Under a latent defects’ analysis, sellers are relieved of their warranties if they disclosed the defect or if it was known or could have been known by purchasers. The obligations to disclose latent defects are mainly geared toward correcting the information asymmetry that subsists between sellers and buyers. The consumers’ reasonable expectations framework is more suitable to address consumer transactions’ particularities and vulnerabilities,¹⁴⁰ thereby leading to more fair, reliable, and efficient markets.

It is naturally appealing for the judiciary to assimilate sellers’ obligations of durability and fitness for purpose to obligations against latent defects, given the well-developed case law in this area, as well as the reasonably clear tests that their application requires. By contrast, the more recent consumer regime

overridden by contract. In the middle of the spectrum, the latter implied obligations cannot be overridden by contract.

¹³⁴ I.e. the “the standard of something when compared to other things like it,” *supra* note 54.

¹³⁵ CCQ art 1726-1731; *QCPA*, *supra* note 18, s 53. See also the discussion on the French cases, *supra* note 120, applying the *Code Civil* general warranty against latent defects.

¹³⁶ For example, in *Larouche c. JVC Canada inc.* (2004) CarswellQue 5948 (CQ) the case involved a video camera which had an dysfunction in the way the tape was ejected, which appeared one year after the sale. Although technically, this could be qualified as a latent defect, the court invoked article 37 and 38 of the *QCPA*, *supra* note 18, warranties of fitness for purpose and of durability, without referring to the present or not of a latent defect.

¹³⁷ As well as the narrower implied obligations of quality and fitness for purpose on the spectrum discussed above in this section.

¹³⁸ L’Heureux, *supra* note 64 at 69, refers to latent defects being limited to cases where goods are altered or deteriorated.

¹³⁹ *Ibid*, at 69-70. The author notes however that warranties against latent defect in the *Civil Code of Québec* and the warranties of durability and fitness for purpose overlap (*ibid*, at 70). Pierre-Claude Lafond, “Le code civil du Québec et la loi sur la protection du consommateur: un mariage de solitudes” (2010) 88 C.B.R. 407, at 419-420 who notes that the presence of a latent defect is not necessary for the application of the statutory warranties of quality and fitness for purpose in the *QCPA*, *supra* note 18.

¹⁴⁰ For instance, to rectify other asymmetries prevailing in consumer transactions, including bargaining power and in some cases the power to shape or at least influence industry norms and practices.

of general durability and fitness for purpose requirements has yet to be more clearly developed and understood. Preserving the integrity and distinctiveness of the statutory consumer warranties of quality and fitness for purpose mandates a different legal analysis than the more constraining legal framework of latent defects.

As a preliminary conclusion on the nature and scope of implied obligations of quality and fitness for purpose, they offer a potentially stronger legal base to consumers of commercial copies of copyright works in the Canadian provincial jurisdictions where they cannot be overridden by contract and where their application relies on consumers' reasonable expectations.¹⁴¹ For reasons that are either dictated by the wording of the statutory implied obligations, or that result from the case law,¹⁴² there is a discernable tendency to assimilate issues of fitness for purpose with issues of quality.

In those Canadian provincial jurisdictions where an implied obligation or statutory warranty of quality or durability co-exists with one of fitness for purpose,¹⁴³ an ordinary-meaning approach to "fitness for purpose" could potentially broaden the support for consumers' open-ended privileges and powers as owners of commercial copies of copyright works and for information products generally. This could bring the analysis of consumers' reasonable expectations beyond a defective v. non-defective analysis that is more common in the narrower application of implied obligations of quality. Issues of quality in the narrower sense are likely to be less prevalent than issues of fitness for purpose in the increasingly complex nature and intrinsic interdependence of information products, as well as with the interaction between various legal regimes, i.e., copyright, property, contract and consumer law.¹⁴⁴

It is with the variable scope of the statutory implied obligations of fitness for purpose and of quality between the Canadian provinces and territories in mind, as well as the various interpretations that can be given to them, that I will argue in Chapter 11 how statutory implied obligations of fitness for purpose and of quality can apply to four possible typical scenarios that involve commercial copies of

¹⁴¹ Such as the implied obligation that goods are of "acceptable quality," sections 48 (d) and 39 of the *SCPA*, *supra* note 33, which also encompasses issues of fitness for purpose.

¹⁴² As this is the case in the majority of the jurisdictions discussed here, where a narrow implied obligation of merchantable quality co-exists with an implied obligation of fitness for a particular purpose brought to the attention of the seller, as previously discussed in Part II A of this chapter.

¹⁴³ E.g., the more general ones as found in *NBCPWL*, *supra* note 33, s 10 (1) (a); *QCPA*, *supra* note 18, ss 37 and 38, as opposed to the narrower fitness for a particular purpose specifically brought to the attention of the seller and where buyer relies on sellers' skill or judgement.

¹⁴⁴ I discuss the ramifications of this complex interaction in Chapter 3 Part III, and in Chapter 7 Part V.

copyright works. Prior to that, I will consider the potential appeal that statutory implied obligations of correspondence with description may have to the protection of consumers' permitted uses of commercial copies of copyright works.

B. Statutory implied obligations of correspondence with description

The statutory implied obligation that goods sold by description¹⁴⁵ correspond with the description is common to all jurisdictions examined here.¹⁴⁶ It is not likely to be of great relevance to ascertain the scope of consumers' permitted uses to copies of copyright works. In Canada, courts have settled on a narrower meaning of "description" that refers to issues of identity of the product.¹⁴⁷ A broader meaning of "description" brings this implied obligation closer to issues about quality and fitness for purpose¹⁴⁸ and does not give more ammunition to consumers than the above discussion under the heading of implied obligations of quality and fitness for purpose.¹⁴⁹ For those reasons, my comments on the nature, scope, and application of the implied obligation of correspondence with description to commercial copies of copyright works will remain brief.

The application of the implied obligation that goods sold by description correspond with the description involves issues of construction of what is "contractually descriptive of the goods."¹⁵⁰ This implied obligation is limited to goods conforming to what sellers have described (for example in non-

¹⁴⁵ See *supra* note 78.

¹⁴⁶ The implied obligation that goods sold by description correspond with the description is a standard implied obligation of sale of goods law: *OSGA*, *supra* note 44, s 14; *BCSGA*, *supra* note 40, s 17 (1) (d); *ASGA*, *supra* note 36, s 15; *NLSGA*, *supra* note 36, s 15(1); *PEISGA*, *supra* note 36, s 15. Similar implied obligations are found in consumer protection legislation: *NSCPA*, *supra* note 40, s 6; *NWTCPA*, *supra* note 40, s 70 (1); *MCPA*, *supra* note 40, s 58 (1); *NBCPWL*, *supra* note 33, s 14; *SCPA*, *supra* note 33, s 48 c); *QCPA*, *supra* note 18, s 40. Similar implied obligations or statutory warranties are found in *Directive 1999/44/EC*, *supra* note 44, art. 2(2) a); *UKSGA*, *supra* note 44, s 13; and in the French *Code de la Consommation*, art. L211-5 1).

¹⁴⁷ In *Ashington Piggeries Ltd. v Christopher Hill Ltd*, *supra* note 119, Lord Wilberforce held that the defect in contaminated herring meal "was a matter of quality or condition rather than of description and that this is what had been provided so that there was no breach of the implied condition of correspondence with description. In *Rahtjen v Stern GMC Trucks* (1969) Ltd. 66 D.L.R. (3d) 566, [1976] W.W.D. 120, (MCA) at para 9, the Manitoba Court of Appeal made the distinction between "description" and "quality": "...the word 'description' refers to the identification of the thing or things sold and not to quality. On the undisputed facts of this case, the respondent received a trailer, albeit one of inferior quality. It is therefore my view that sec. 15 has no application."

¹⁴⁸ See Benjamin's Sale of Goods, 7th ed., *supra* note 79 at para 11-016.

¹⁴⁹ See the discussion in Part II A. of this chapter.

¹⁵⁰ Fridman, *supra* note 51 at 166.

negotiated standard end-user agreements in online transactions) or in the notifications appearing on commercial copies of copyright works (such as on musical CDs or film DVD packaging).¹⁵¹

Copies of copyright works are sold over the counter with almost no description,¹⁵² or, when distributed online, they typically come with extensive non-negotiated standard end-user agreements.¹⁵³ Under the no terms and conditions scenario, the absence of description leaves little room to invoke the implied obligation of correspondence with description. The consumer will purchase a specific musical recording CD or a film DVD by relying on the CD or DVD title and cover. Any mistake between the title and cover and the actual CD or DVD, or the fact that the CD or film cannot be played or listened to would indeed amount to an unequivocal breach of the implied obligation of description. This would be the same for any other goods and would raise no particular issues specific to copies of copyright works. Under the non-negotiated standard end-user agreements' scenario, any difference between the detailed description of the usage rights of the musical recording or film and the actual uses that can be made would follow the same logic. It would not solve any issues that are specific to the permitted scope of use of commercial copies of copyright works.

To conclude, given the narrow interpretation of the implied obligation of correspondence with description, it makes it a less good candidate to ascertain and protect consumers' permitted uses of commercial copies of copyright works than possibly, the implied obligations of quality and fitness for purpose that I analyzed earlier, and as I will discuss next, some of the implied obligations of title, quiet possession and freedom from encumbrance.

C. Statutory implied obligations of title, quiet possession, and freedom from encumbrances

In the common law provinces and territories of Canada, there are three distinct yet closely related implied obligations that revolve around sellers' ability to deal with goods. There is an implied obligation that sellers have the right to sell the goods,¹⁵⁴ an implied obligation that buyers shall enjoy

¹⁵¹ See *supra* note 147.

¹⁵² Other than the name of the artist, title, and very limited notifications of use, if any.

¹⁵³ *Ibid.*

¹⁵⁴ For example, see *OSGA*, *supra* note 44, S 13 (a); *SCPA*, *supra* note 33, s 48 (a).

the quiet possession of the goods¹⁵⁵ and that the goods are free from any charges or encumbrances.¹⁵⁶ The implied obligations are subject to limited exceptions.¹⁵⁷ Similar implied obligations or statutory warranties exist in the other jurisdictions examined here.¹⁵⁸ In the context of ascertaining consumers' rights to commercial copies of copyright works, the implied obligation that sellers have the right to sell the goods and that buyers shall enjoy the quiet possession of the goods may offer greater appeal than would the implied obligation that the goods are free from any charges or encumbrances.¹⁵⁹

There is jurisprudence to the effect that the seller's implied obligations of title and of quiet possession include obligations that the goods comply with laws,¹⁶⁰ which, as I discuss in Chapter 11, may enable the development of an interesting argument to support copyright consumers' users' rights as they are dictated by copyright law. As for the implied obligation of quiet possession, its exact nature and scope is not entirely clear. This leaves room for arguments in favour of ascertaining consumers' rights to copies of copyright works, especially in the presence of technological protection measures [TPMs].¹⁶¹ The third implied obligation, e.g., that the goods are free from any charges or encumbrances, generally covers instances whereby personal property securities or other forms of lien are attached to the purchased goods,¹⁶² which are not relevant to the present discussion.¹⁶³ Accordingly, the following analysis will focus on the implied obligations of title and of quiet possession.

¹⁵⁵ E.g. See *OSGA*, *supra* note 44 s 13(b); *SCPA*, *supra* note 33, s 48(b) (ii); *NBCPWLA*, *supra* note 33, s 8(1) c; *MCPA*, *supra* note 114, s 58(1) b); *BCSGA*, *supra* note 114, s 16(b), *NSCPA*, *supra* note 40, s 26(3) b); *NWTCPA*, *supra* note 40, s 70 (1) (b) *ASGA*, *supra* note 36, s 14(b); *NLSGA*, *supra* note 36, s 14(b); *PEISGA*, *supra* note 36, s 14(b). The Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, s 6, provides that everyone has a right to the peaceful enjoyment of his property.

¹⁵⁶ For example, see *OSGA*, *supra* note 44, s 13 (c); *SCPA*, *supra* note 33, s 48 (b) (i). In Québec, there is a warranty that the goods are free from any charges or encumbrances: *QCPA*, *supra* note 18, s 36. CCQ, art 1724 contains a warranty against any "encroachments" on his part unless it was disclosed at the time of the sale.

¹⁵⁷ In several provincial jurisdictions, these implied obligations apply unless the circumstances around the contract show a different intention: *OSGA*, *supra* note 44, s 13; *ASGA*, *supra* note 34, s 14; *NLSGA*, *supra* note 36, s 14; *PEISGA*, *supra* note 36, s 14; *BCSGA*, *supra* note 40, s 16. The implied warranty of freedom from encumbrance does not apply with respect to such encumbrances that were declared or known to the buyer before the contract of sale was entered into: *OSGA*, *supra* note 44, s 13(c); *ASGA*, *supra* note 36, s 14(c); *NLSGA*, *supra* note 36, s 14(c); *PEISGA*, *supra* note 36, s 14(c); *BCSGA*, *supra* note 40, s 16 (C).

¹⁵⁸ *US UCC*, *supra* note 12, § 2-312; *UKSGA*, *supra* note 44, s 12; *UKSGSA*, *supra* note 62, s 2.

¹⁵⁹ I apply these obligations to copies of copyright works in Chapter 11.

¹⁶⁰ See the discussion on the jurisprudence pertaining to the implied obligations related to title and of quiet possession further below in Part II C of this chapter.

¹⁶¹ See the discussion in Chapter 11.

¹⁶² Ziegel & Duggan, *supra* note 39, at 210.

¹⁶³ I.e., they are not likely to raise any issues of interest that are specific to copies of copyright works.

Unlike statutory implied obligations of quality or fitness for purpose, the legal regime applicable to implied obligations of title and of quiet possession is more uniform across the common law provinces and territories in Canada.¹⁶⁴ In the majority of provinces and territories, the statutory implied obligation of quiet possession cannot be overridden by contract, except in three provinces.¹⁶⁵

The jurisprudence on the implied obligation that “the seller has the right to sell the goods” interprets this obligation broadly, i.e., beyond strict issues of defective title pertaining to the ownership of the sold goods (e.g. stolen goods,¹⁶⁶ or goods on hire-purchase agreements that were sold before ownership passed on to the buyer¹⁶⁷) that raise no issues that are specific to copy ownership of copyright works. The implied obligation of title has been applied to instances whereby the seller was precluded from selling the goods to the purchaser for reasons other than title in the goods. The seller of cases of condensed milk was found to have breached the implied obligation of title in *Niblett Ltd. v Confectioners’ Materials Co. Ltd.*,¹⁶⁸ because a portion of the cases sold bore a trademark that infringed the trademark rights of a third party.¹⁶⁹ Bankes LJ rejected a narrower application of this implied obligation that would limit it to acts and omissions of the vendor and those acting by his authority: “I think that s. 12 has a much wider effect and that the language did not warrant such limitations.”¹⁷⁰ In addition, in order to be able to sell the cases of condensed milk, the buyer had to strip off each label bearing the infringing trademark.¹⁷¹ The facts of this case could also have raised

¹⁶⁴ See *supra* note 155.

¹⁶⁵ Namely in Alberta, Newfoundland & Labrador and in Prince Edward Island: *supra* note 155.

¹⁶⁶ For example one landmark judgment on the implied condition of title *Rowland v Divall* [1923] 2 KB 500, [1923] All ER Rep. 270 (CA), involved the application of the implied condition to a stolen car. In *Butterworth v Kingsway Motors Ltd.* [1954] 1 WLR 1286, [1954] 2 All ER 694 (QB), the applicability of the implied condition of title revolved around the hire-purchase of a car that belonged to a third party.

¹⁶⁷ This was the case in *Patten v Thomas Motors Pty. Ltd.* (1965), 65 NSW 458 (Australia).

¹⁶⁸ [1921] 3 KB 387, [1921] All ER Rep. 459 (CA).

¹⁶⁹ *Ibid.* In that case, the seller argued that it was understood between the parties that the goods would be of one or another brand, to which Bankes LJ responded: “But assuming that goods of one or more of three brands might be delivered under the contract, that circumstance does not show any intention that if two of those brands are free from objection, and the third is an infringement of trade mark rights, the vendor may tender goods of the third brand in fulfilment of this contract. The goods tendered must still be goods which the vendor has a right to sell. Therefore, in my opinion the appellants have established a right of action under s 12, sub-s 1 of the Act.”

¹⁷⁰ *Ibid.* See also *Azzurri Communications Limited v International Telecommunications Equipment Limited t/a SOS Communications*, [2013] EWPC 17 at paras 49,51,75, where the Court held that software that turned out to be counterfeited and infringed the trade-marks of original software manufacturer was supplied in breach of the seller’s implied obligation of having the right to sell the goods. (*UKSGA, supra* note 44, s 12(1) and of quiet possession (*UKSGA, ibid*, s 12 (2) (b)).

¹⁷¹ *Ibid.*

issues of quiet possession.¹⁷² In *J. Barry Winsor & Associates Ltd. v Belgo Canadian Manufacturing Co. Ltd.*, a seller of electric lamps that did not comply with British Columbia regulations¹⁷³ was found to be in breach of the implied obligation that “the seller has the right to sell the goods.”¹⁷⁴

The exact scope of the statutory implied obligation of quiet possession remains unclear.¹⁷⁵ The existence of separate statutory implied warranties of title and freedom from encumbrances suggests that the implied obligation of quiet possession refers to issues that are broader than questions related to title and encumbrances, as illustrated by *Rubicon Computer Systems Limited v United Paints Limited*.¹⁷⁶ In that case, the Court of Appeal of England and Wales held that the application by a software supplier of “time locks” on software delivered to the purchaser constituted a breach of the implied obligation of quiet possession under UK *Sale of Goods Act* [UKSGA].¹⁷⁷ The implied obligation of quiet possession supports the expectations that come with the ownership of goods, e.g., the *prima facie* open-ended privileges and powers with no duty to account to anyone as to their merit.¹⁷⁸ Although its co-existence with distinct implied warranties, as well as the case law on quiet possession, suggest a broader meaning of quiet possession, there remains a close connection between quiet possession and issues related to the title and encumbrances of the goods.¹⁷⁹

¹⁷² *Ibid.* See the discussion in this section further below in the implied warranty of quiet possession. The implied warranty of quiet possession if breached, would give rise to damages, while the implied condition of title would give rise to a right to rescind the contract in addition to the right to claim any damages.

¹⁷³ Regulations, B.C. Reg. 166/73, made under the *Electrical Energy Inspection Act*, RSBC 1960, c. 126,

¹⁷⁴ (1975) 61 DLR (3d) 352 (BCSC); aff’d 76 DLR (3d) 685 (CA). However in *Ahlstrom Canada Ltd. v Browning Harvey Ltd.* (1987), 31 DLR (4th) 316 (NFLD CA), the Court held that the seller did not breach the implied condition that he had the right to sell plastic bottles which were later banned under the *Hazardous Products Act*, RSC 1985, C. H-3, on the basis, that at the time of the sale, such bottles were not prohibited and that any risk on the use of the bottles later on had to be borne by the purchaser, not the seller.

¹⁷⁵ For a discussion on the implied warranty of quiet possession in Canada, see Fridman, *supra* note 51 at 104-108.

¹⁷⁶ (2000) 2 T.C.L.R. 453 (C.A.). See also *Microbeads, A.C. and another v Vinhurst Road Markings Limited*, [1975] 1 W.L.R. 218 (CA) whereby the cause of the alleged breach of quiet possession, i.e. a patent that was infringed, did not exist at the time of the sale of the goods: see the discussion of this case further below in Part II C of this chapter.

¹⁷⁷ *Supra* note 44. The Court upheld the lower Court judgment that this amounted to a repudiatory breach by the supplier that entitled the purchaser to the return of the purchase money.

¹⁷⁸ James W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996) at 65. See the discussion on the main attributes of property and ownership in Chapter 4 Part II as well as in Chapter 10 on the theoretical justifications of consumer protection law obligations.

¹⁷⁹ Issues of title will typically interfere with the buyers’ possessory enjoyment of the purchased good, while the possessory enjoyment of goods does not always involve issues of title. In the provinces of Saskatchewan and of New Brunswick, the statutory implied warranties of quiet possession are tied to issues of title, e.g. that if the latter are disclosed to the buyer by the seller or are known by the buyer at the time of the sale, they do not cause the implied warranty of quiet possession to be breached: *supra* note 155.

Two cases involving a breach of the implied obligation of quiet possession revolved around the threat of patent infringement or actual patent infringement suit from a third party against the purchaser of machinery, resulting from the use of the machinery by the purchaser. In *Microbeads, A.C. and another v Vinhurst Road Markings Limited*,¹⁸⁰ the purchaser of a road-marking machine was sued, shortly after the purchase, by the owner of a patent pertaining to the machinery. Even though the seller had the right to sell the machinery to the plaintiff, this was found by the court to be a breach by the seller of the implied obligation of quiet possession. The Ontario Supreme Court was seized with similar issues in *Gencab of Canada Ltd. v Murray-Jensen Manufacturing Co.*¹⁸¹ In that case, the patent owner had not yet taken action against the purchaser of machinery. And yet, the threat of legal action and the impact it had on the purchaser's use of the machinery was enough to amount to a breach of the statutory implied obligation of quiet possession by the seller.¹⁸² Another case involved the unauthorized use by the seller of a newly purchased trailer while it was left in storage with the seller by the purchaser. The court found that by using the trailer of the buyer, the seller was in breach of the implied obligation of quiet possession.¹⁸³ Similarly to the implied obligation of title, the supply of goods that do not comply with applicable laws and regulations could also amount to a breach of the implied obligation of quiet possession.¹⁸⁴

¹⁸⁰ *Supra* note 176.

¹⁸¹ 1980 CarswellOnt 841 29 O.R. (2d) 552, 53 C.P.R. (2d) 116 (OSC).

¹⁸² *Ibid*, at para 32ff. However, in another intellectual property case, a buyer (defendant) could not invoke breach of the implied warranty of quiet possession (section 12(2)(b) of the *UKSGA*, *supra* note 44, by the supplier for an article that infringed the copyright of the claimant on the basis that the buyer (defendant) had explicitly requested the seller to make a copy of the infringing article: *Hi-Tech Autoparts Ltd v Towergate Two Ltd*, [2002] FSR 15 (Patents County Court).

¹⁸³ *Kralik v Karking Marine Ltd.* 1988 WL 873702 (ODC), at para 21. See also *Azzurri Communications Limited v International Telecommunications Equipment Limited t/a SOS Communications*, *supra* note 170 at paras 49,51,75, where the Court held that software that turned out to be counterfeited and infringed the trade-marks of original software manufacturer was supplied in breach of the seller's implied obligation of having the right to sell the goods. (*UKSGA*, *supra* note 44, s 12(1) and of quiet possession (*UKSGA*, *ibid*, s 12 (2) (b)). See also *Great Elephant Corp v Trafigura Beheer BV & Ors*, [2012] EWHC 1745 (Comm).

¹⁸⁴ This question was discussed but not definitively decided in *Meyknecht-Lischer Contractors Ltd. v Stanford* (2005) WL 4904857 (OSC). In that case, the purchaser alleged that the supplier and installer of a fence had breached the implied warranty of quiet possession because the fence did not comply with applicable laws. The court considered this argument but rejected it in that case because the purchaser had the responsibility to obtain any applicable permits. Also, the court did not find that there was a lack of quiet possession caused by the non-compliance with laws given that as a result thereof, the purchaser ended up enjoying a larger piece of property than had the fence been legally compliant. The issue of the linkage between the implied warranty of title and quiet possession and the conformity of products with safety laws was also raised but not decisively decided upon in *Guillevin International Inc. v Antique Building Supplies Ltd.* (1991) WL 1142203 (OGD). This case involved the sale of gaskets which did not comply with the standards of the Canadian Standard Association, which was a requirement under Quebec laws, where the gaskets were to be resold.

Failure of products to comply with legal requirements¹⁸⁵ interpreted as a breach of implied obligation of title, and the still undefined contours of the implied obligation of quiet possession, offer an interesting avenue to ascertain consumers' ownership rights in commercial copies of copyright works. As I discussed in Chapter 3, copyright holders do not typically make room for consumers' rights under copyright law¹⁸⁶ in the non-negotiated standard end-user agreements that consumers have to agree to in order to access commercial copies of copyright works online. The interesting question is to what extent such ignorance of copyright law could amount to a breach of the implied obligations of title or quiet possession? Similarly, access, copy controls, and digital rights management applied to commercial copies of copyright works are pressing us to revisit our traditional understanding of ownership and possession, the quietness of which is increasingly under attack.¹⁸⁷ In Chapter 10 and in Chapter 11,¹⁸⁸ I analyze the theoretical justifications of statutory implied obligations of title, quiet possession, and freedom from encumbrances and apply them to specific scenarios involving different uses of copies of copyright works

The extent to which the application of implied obligations of quality, fitness for purpose, title, and quiet possession depends (or should) on how much information is disclosed to consumers varies across the spectrum of implied obligations reviewed so far. It varies based on the legal test applied and how much emphasis is placed on the relevance of whether information was in fact disclosed. The fact that courts are usually not impressed with broad disclosures or statements of suppliers as a means to notify consumers of the existence of a defect is illustrative of the complex interaction that exists between implied obligations and information disclosure.¹⁸⁹ When and how does the disclosure of information pertaining to commercial copies of copyright works limit the application of statutory implied obligations?

The interaction between statutory implied obligations and information disclosure is central to the understanding of the scope of protection that statutory implied obligations offer to consumers. The

¹⁸⁵ Such as electricity standards, see *supra* note 173.

¹⁸⁶ E.g., of the acts that consumers can perform on the copyright works without copyright holders' consent.

¹⁸⁷ The application by the supplier of copy controls i.e. "time locks" to software delivered to the purchaser, was held to constitute a breach of the implied obligation of quiet possession in *Rubicon Computer Systems Limited v United Paints Limited*, *supra* note 176. See the application of this implied obligation to specific scenarios involving commercial copies of copyright works in Chapter 11.

¹⁸⁸ More specifically, I discuss the theoretical justifications of statutory implied obligations in Chapter 10, and apply them to four scenarios of uses of copies of copyright works in Chapter 11.

¹⁸⁹ See *supra* note 71.

discussion above in this chapter on the opportunity to apply the legal framework of latent defects to statutory implied obligations of quality and fitness for purpose in consumer transactions is an example.¹⁹⁰ The increased use by copyright holders of elaborate non-negotiated standard end-user agreements with the supply online of copies of musical recordings and films presses the merits of that investigation even further. The theoretical justifications of statutory implied obligations that I will discuss in Chapter 10, as well as the role of information disclosure in consumer protection obligations that I discuss below in the present chapter,¹⁹¹ will help solidify the understanding of that interaction.

To sum up on the nature and scope of statutory implied obligations and how they can assist consumers in their claims against restricted uses of commercial copies of copyright works, the implied obligations of title and of quiet possession are likely to offer the strongest legal base for an argument that protects consumers. Implied obligations of quality and fitness for purpose also offer an interesting avenue to enforce consumers' reasonable expectations of permitted uses of commercial copies of copyright works in those provinces and territories of Canada that offer a regime that is more favourable to consumers.

Before moving to the nature and scope of information disclosure requirements in consumer law and how they impact on the statutory implied obligations examined here, I will make a brief incursion into the potential relevance and application of provisions prohibiting unfair practices to the permitted scope of use of copies of copyright works.

III. Unfair practices

Most consumer protection law statutes across Canada prohibit unfair practices, e.g., making a false, misleading, deceptive, or unconscionable representation.¹⁹² They typically include a non-exhaustive list of practices that may be considered as unfair.¹⁹³ Among those practices, “a representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false,

¹⁹⁰ I discuss the linkages between statutory warranties of quality and warranties against latent defect in Québec and in France in Part II A of this chapter.

¹⁹¹ See Part IV of this chapter.

¹⁹² For example, see *OCPA*, *supra* note 18, ss 14-15; *QCPA*, *supra* note 18, art. 8, 10, 11 & 215ff.

¹⁹³ For examples, a representation claiming sponsorship approvals that are not true or a representation of certain attributes or quality of goods or services that are non-existent would fall under that category: *OCPA*, *supra* note 18, s 14 (2) 1 & 3.

misleading or deceptive”¹⁹⁴ or a “representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive”¹⁹⁵ may be relevant to terms (or the absence of terms) dealing with the scope of use of copies of copyright works. Further, representations, by a person who knows or ought to know, “that the consumer transaction is excessively one-sided in favour of someone other than the consumer” or “that the terms of the consumer transaction are so adverse to the consumer as to be inequitable”¹⁹⁶ may also find application with respect to transactions involving commercial copies of copyright works.¹⁹⁷ At the federal level, the *Competition Act* also prohibits certain commercial practices.¹⁹⁸ Similar regulations prohibiting unfair practices in consumer commercial transactions exist in the European Union,¹⁹⁹ with

¹⁹⁴ *OCA*, *supra* note 18, s 14 (2) 13. See also the *BCPCPA*, *supra* note 114, s 4(3) (b) (iv); *MCPA*, *supra* note 40, s 2(3) (n); *AFTA*, *supra* note 114, s 6(2) (c); *SCPA*, *supra* note 33, s 6(k); New Foundland and Labrador *An Act Respecting Consumer Protection and Business Practices*, SNL 2009, c C-31.1 [NLCPBPA], s 7(1) (p); Prince Edward Island *Business Practices Act*, R.S.P.E.I. 1988, c. B-7 [PEIBPA], s 2 (a) (xii).

¹⁹⁵ *OCA*, *supra* note 18, s 14 (2) 14. See also the *BCPCPA*, *supra* note 114, s 4(3) (b)(vi); *AFTA*, *supra* note 114, s 6(3) (d); *MCPA*, *supra* note 40, s 2(3) (p) & 2(1) (a); *SCPA*, *supra* note 33, s 6 (o) & 5(a); *NLCPBPA*, *supra* note 194, s 7(1)(w); *PEIBPA*, *supra* note 194, s 2(a) (xiii).

¹⁹⁶ *OCA*, *supra* note 18, s 15 (2) e) & f). See also British Columbia *Business Practices and Consumer Protection Act*, SBC 2004 c.2 [BCBPBPA], s 8(3) (e); *SCPA*, *supra* note 18, s 6 (q); *NLCPBPA*, *supra* note 194, s 8(1) (d); *PEIBPA*, *supra* note 194, s 2 (b) (v) & (vi).

¹⁹⁷ See the discussion in Chapter 11 on the application of consumer protection obligations to four scenarios involving copies of copyright works.

¹⁹⁸ *Competition Act* (RSC 1985, c. C-34) S 74 “Deceptive marketing practices reviewable matters”, including s. 74.01 (a) “representation to the public that is false or misleading in a material respect” and includes deceiving practices relating to price, contests, lotteries. The Commissioner has the power to bring certain practices for review before the courts referred to in the Act. Courts have the power to issue penalties if there is a finding of a deceptive marketing practice: *Ibid.* s 74.1. The eventual application of these provisions is outside the scope of this chapter.

¹⁹⁹ EC, *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, [1993] OJ L095, at 29 [Directive 93/13/EEC] sets general rules concerning contract terms (e.g. use of plain and ordinary language, interpretation of ambiguous terms to favour consumers: art. 5; unfair terms to be non-binding on consumers: art. 6, and characterizes a contract term as unfair “if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.(art. 3 para 1). It also provides “an indicative and non-exhaustive list of the terms which may be regarded as unfair (art. 3 para 3). Of potential interest to the present discussion on terms prohibiting the exercise of consumers’ rights (or limitations of copyright) to copies of copyright works, the Annex lists as unfair term those terms “(q) excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy.” EC, *Parliament and Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council*, [2005] OJ L 149 at 29 [Directive 2005/29/EC] the object of which is (article 1) to approximate the laws of the Member States“ on unfair commercial practices harming consumers’ economic interests”, may also be of interest (such as the prohibition against misleading actions (art. 6, in particular paras 1 f and g regarding representations on the nature of the intellectual property rights of the trader or is agent or on the nature of the rights of consumers) although many of the practices it targets are of a nature that would be

their national implementation counterparts in, *inter alia*, the UK²⁰⁰ and France.²⁰¹ In the US, the *UCC* contains provisions conferring powers to the courts to set aside a contract or any term thereof that is held to be unconscionable.²⁰² The remedies that are available against practices held to be unfair include restitution, rescission of contract, damages, specific performance, injunction, an order to comply with a voluntary compliance agreement, and any other remedies available at law.²⁰³ Unfair practices may also constitute an offence subject to penal sanctions.²⁰⁴ In some Canadian jurisdictions, the body responsible for overseeing the application of consumer protection laws has broad powers to intervene against unfair practices, including the authority to seek injunctive relief.²⁰⁵ Similar remedies are available in the other jurisdictions examined here.²⁰⁶

The prohibition of unfair practices specifically targets non-negotiated standard end-user agreements, including copyright notices.²⁰⁷ The prohibition constrains suppliers' freedom of contract by forbidding certain commercial practices to protect consumers against abuses. The remedies that accompany prohibitions of unfair practices suggest that they can act as a strong deterrent against such conduct and influence behaviours favourably in the marketplace.

likely outside the scope of the present discussion (e.g. art. 5 prohibits an unfair commercial practice which is defined as a practice that (at par. 2 (b) "materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer"; art. 8 aggressive commercial practices). The potential application of these directives to terms and conditions that restrict *inter alia* consumers' exercise of copyright limitations or use of materials that are in the public domain is discussed in: Lucie Guibault, "Accommodating the Needs of iConsumers: Making Sure They Get Their Money's Worth of Digital Entertainment" (2008) 31 J Consum Policy 409, more particularly at 416.

²⁰⁰ *Directive 93/13/EEC*, *supra* note 199, was implemented in the UK through the *Unfair terms in Consumer Contracts Regulations 1999*, SI 1999/2083 [UKUTCCR]; *Directive 2005/29/EC*, *supra* note 199, was implemented through the *Consumer Protection from Unfair Trading Regulations 2008*, SI 2008/1277 [UKCPUTR].

²⁰¹ *Code de la consommation*, art L120-1ff deals with "pratiques déloyales."

²⁰² *US UCC*, *supra* note 12, § 2-302 and § 2A-108.

²⁰³ *OCPA*, *supra* note 18, s 18. See also *Alberta Fair Trading Act*, R.S.A. c. F-2 [AFTA], s 7(1); *MCPA*, *supra* note 40, s 23(2); *SCPA*, *supra* note 33, ss 15-16 under which the consumer or the Director on her behalf, can take legal action against unfair practices; *BCBPCPA*, *supra* note 196, s 10(1); *NLCPBPA*, *supra* note 194, s 10; *PEIBPA*, *supra* note 194, s 4 (1) & (2).

²⁰⁴ *QCPA*, *supra* note 18, s 277; *OCPA*, *supra* note 18, s 116.

²⁰⁵ For example, see *SCPA*, *supra* note 33, ss 15-16.

²⁰⁶ For example, see, *UKUTCCR*, *supra* note 200, s 12. Regarding more generally the remedies that need to be available in each member states, see *Directive 93/13/EEC*, *supra* note 199, art 7, and *Directive 2005/29/EC*, *supra* note 199, art 11.

²⁰⁷ This is the case of *Directive 93/13/EEC*, *supra* note 199, which specifically regulates non-negotiated consumer commercial transactions.

The vagueness of what constitutes unfair practices allows flexibility in how the relevant provisions may apply to a broad range of transactions.²⁰⁸ At the same time, the prohibitions against unfair practices require an element of falsehood, deceit, or unconscionability, or a practice that is misleading, which tends to limit their scope of application.²⁰⁹ In contrast, statutory warranties or implied obligations are deemed to be present in all consumer transactions, and are mandatory in the majority of jurisdictions examined here.²¹⁰ As I discuss next, information disclosure requirements, while they provide less effective remedies for the purpose of our discussion, also apply to a broad range of transactions that are pertinent to commercial transactions of copies of copyright works.²¹¹

The named unfair practices that may be particularly relevant with respect to the permitted scope of use of commercial copies of copyright works²¹² are more limited in their effect as they would require that the use restriction be notified to consumers to remedy the falsehood or misleading nature of the commercial transaction without impacting on the use restriction at a substantive level, as this is the case when applying consumer protection implied obligations.²¹³ The operation of prohibitions against unfair practices is illustrated by two French cases. In *EMI Music France v Association CLCV*,²¹⁴ CLCV, an association representing the interests of consumers, alleged that EMI Music France was in contravention of several articles of the French *Code de la Consommation* and *Code Civil*.²¹⁵ The CDs could only be played on a limited number of CD players. CLCV alleged that the brief notice on the CDs, i.e., that they were subject to technological measures and use restrictions was misleading consumers. The Court of Appeal confirmed the judgment by the Court of First Instance,²¹⁶ and held

²⁰⁸ Nicola Lucchi, "The Supremacy of Techno-Governance: Privatization of Digital Content and Consumer Protection in the Globalized Information Society" (2007) 15 International Journal of Law and Information, 192, in particular, at 221ff, briefly discusses the potential application of consumer tools in the sphere of unfair transactions, e.g. the doctrine of unconscionability in the US as well as the pertinent EU secondary law to technological protection measures. The author points to the flexibility and yet vagueness that these legal mechanisms offer to a consumer protection analysis.

²⁰⁹ *Supra* note 194, note 195 and note 196.

²¹⁰ The scope of application of implied obligations is discussed in Part II A. of this chapter.

²¹¹ Information disclosure requirements are required in distance contracts and Internet agreements, and in some jurisdictions for all consumer agreements, as this is discussed in Part IV of this chapter.

²¹² See *supra* note 194, note 195 and note 196. However, the list of conduct that may constitute an unfair practice is not exhaustive.

²¹³ As discussed in Part III A of this chapter.

²¹⁴ CA Versailles, 30 September 2004, *S.A. EMI Music France v Association CLCV*, online: <http://www.foruminternet.org/documents/jurisprudence/lire.phtml?id=809> [*EMI Music France, 2004*].

²¹⁵ I.e., *Code de la Consommation*, art L 121-1, L 213-1, L 421-1; L421-2.1; L 421-9 and C civ. art 1382.

²¹⁶ Trib gr instance Nanterre, 24 June 2003, *Association CLCV/EMI Music France*, online: www.legalis.net/cgi-iddn/french/affichejnet.cgi?droite=internet_dtauteur.htm.

that EMI Music France had misled consumers on the fitness for use of its CDs, in contravention of article L213-1 of the French *Code de la Consommation*.²¹⁷ In doing so, the Court of Appeal confirmed the orders by the Court of First Instance i.e., that a specific notice that the CDs could not be played on all CD players be placed forthwith on the CDs, and of awarding damages to CLCV.²¹⁸

In *Association UFC Que Choisir v Société Sony France, Société Sony United Kingdom Ltd*,²¹⁹ UFC Que Choisir, an association representing the interests of consumers, alleged that Sony France and Sony United Kingdom were misleading consumers in contravention of article L213-1 of the French *Code de la Consommation*. Sony United Kingdom operated the online music download site Connect. Sony France distributed digital MP3 players that were the only ones able to play the musical recordings downloaded from the Connect website. In other words, the technological protection measure applied to the musical recordings downloaded from the Connect website restricted the transfer, and those recordings could not be played on other digital mp3 players available on the market. Moreover, the MP3 players sold by Sony France could not play musical recordings downloaded from other platforms. Having reviewed the terms and conditions attached to the Connect platform and the MP3 players, the Court of First Instance found that Sony France and Sony United Kingdom contravened to their obligations under article L111-1 of the French *Code de la Consommation*.²²⁰ The Court ordered Sony France to place forthwith on its MP3 players a notice that specifically mentioned the use restrictions of the MP3 players, and ordered Sony France and Sony United Kingdom to pay damages to UFC Que Choisir.²²¹

In both *EMI Music France 2004* and *Sony France and Sony UK*, the orders required that proper notices of the use restrictions be put in place, without impacting on the substance of the restrictive uses attached to the musical recordings and to the MP3s players *per se*. The prohibitions against unfair practices may have more drastic effects on other commercial practices, for example, and as I

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ Trib gr instance Nanterre, 6th chamber, 15 Decembre 2006, *Association UFC Que Choisir v Société Sony France, Société Sony United Kingdom Ltd*, online: http://www.legalis.net/jurisprudence-decision.php?id_article=1816 [*Sony France and Sony UK*].

²²⁰ *Ibid.* This case also involved the determination of the existence of “tied selling” (ventes liées).

²²¹ *Ibid.*

will discuss in Chapter 11, if copies of copyright works are supplied in a manner that does not comply with the requirements of copyright law.²²²

The willingness of consumer protection agencies to take action against unfair practices is one determining factor of the effectiveness of legal prohibitions to address systemic harmful practices. In the US, the Federal Trade Commission (FTC) rejected a complaint filed by the Computer & Communications Industry Association (CCIA) that alleged that copyright warnings of a list of companies²²³ constituted unfair and deceptive trade practices.²²⁴ The CCIA alleged that the copyright warnings exaggerated the rights of the copyright holders by ignoring consumers' statutory fair use rights. It also argued that notices to the effect that descriptions and accounts of sports games could not be disseminated were "manifestly false" as the US *Copyright Act* does not protect facts and ideas, and that the warnings of possible harsh civil and criminal sanctions generally mislead the public.²²⁵ The FTC responded that it did not have sufficient evidence to conclude that such warnings were unfair and deceptive practices and that "consumers would be likely to refrain from engaging in lawful activities as a consequence of reading those warnings."²²⁶ The complaint by the CCIA to the FTC illustrates one avenue where prohibitions against unfair terms could target specific or more systemic practices by which copyright holders falsely depict consumers' rights to commercial copies of copyright works in a disparaging way. Recent research conducted in the field of behavioural law and economics tends to demonstrate how non-negotiated standard end-user agreements shape consumers' perceptions and expectations of the norm and how they are utilized in some cases to exploit consumers' weaknesses

²²² More specifically, Chapter 11 Part IV.

²²³ The following companies were listed in the complaint filed by the CCIA to the FTC, *infra* note 225: National Football League, NFL Properties, Inc., NFL Enterprises LLC, Major League Baseball, Major League Baseball Properties, Inc., Major League Baseball Advanced Media, LP, NBC Universal, Inc., Universal Studios, Inc., Morgan Creek Productions, Inc., DreamWorks Animation SKG, Inc., DreamWorks LLC, Harcourt, Inc., and Penguin Group (USA), Inc.

²²⁴ For a review of the complaint and the response by the FTC, see: Scott L. Walker & Matthew Savare, "Foul Use? FTC Declines to Take Action against Allegedly Overbroad and Misleading Copyright Warnings" (2008) 25 WTR Ent. & Sports Law. 1.

²²⁵ The Request for investigation and complaint for injunctive and other relief, dated August 1, 2007, filed by the CCIA with the FTC, online: http://www.google.ca/search?sourceid=navclient&ie=UTF-8&rlz=1T4ADBF_enCA275CA275&q=Computer+%26+Communications+Industry+Association+complaint+federal+trade+commission+2007.

²²⁶ FTC's letter in response to CCIA's complaint dated December 6, 2007, online: http://www.google.ca/search?sourceid=navclient&ie=UTF-8&rlz=1T4ADBF_enCA275CA275&q=Computer+%26+Communications+Industry+Association+complaint+federal+trade+commission+2007

and ignorance.²²⁷ The powers conferred on some consumer agencies in Canada and elsewhere to investigate and intervene with respect to unfair commercial practices should be used proactively to protect and educate consumers of their rights. The sample review, in Chapter 3, of non-negotiated terms and conditions of commercial copies of e-books, musical recordings, and films distributed online suggests that there could be material worth the investigation.²²⁸ In particular, to what extent is the lack of reference in non-negotiated terms and conditions to consumers' users' rights under copyright law misleading and an unfair practice?

In Chapter 11, I will discuss the possible application of prohibitions against unfair terms in restrictive terms of use on fair use, fair dealing, and other acts specifically permitted by copyright law without the authorization of copyright holders.²²⁹ More generally and with these considerations on the nature and possible scope of application of prohibitions against unfair practices in mind, I will apply them to various scenarios implicating the commercialization of copies of copyright works.²³⁰

To sum up, prohibitions on unfair commercial practices to protect consumers are particularly relevant to commercial transactions involving copies of copyright works. In particular, this is so with respect to the increasingly prevailing practice under which they are made available through non-negotiated standard end-user agreements that are typically silent on consumers' rights to copyright works under copyright law, or that may, in some cases, represent the scope of copyright holders' exclusive rights in a manner that is misleading to consumers. I will complete our discussion on the nature and scope of consumer protection obligations and their application to commercial copies of copyright works with the central role and operation of information disclosure requirements in consumer law and their ramifications on the other consumer protection obligations that I discussed above in this chapter.

²²⁷ For example, see: Oren Bar-Gill, "Seduction by Plastic" (2004) 98 Nw. U.L. Rev. 1373. See also: On Amir & Orly Lobel, "Stumble, predict, nudge: how behavioural economics informs law and policy", Book Review of *Nudge: improving decisions about health, wealth and happiness*, by R.H. Thaler and C.R. Sunstein & *Predictably irrational: the hidden forces that shape our decisions*, by D. Ariely (2008) 108 Colum. L. Rev. 2098.

²²⁸ In particular, see the discussion in Chapter 3 Part III C.

²²⁹ In particular, Chapter 11 Part IV.

²³⁰ See the discussion in Chapter 11.

IV. Information disclosure requirements in consumer contracts

A. Specific information disclosure obligations

Most consumer protection law statutes across Canada require that suppliers provide specific information to consumers before and after “distance contracts” or “Internet sales agreements” are concluded.²³¹ Of particular interest to our discussion on the scope of consumers’ rights to copies of copyright works is the obligation to disclose a “fair and accurate description of the goods and services proposed to be supplied to the consumer, including the technical requirements, if any, related to the use of the goods or services.”²³² Suppliers are also obligated to disclose “any other restrictions, limitations and conditions that would be imposed by the supplier.”²³³ Those requirements apply only for contracts concluded above a prescribed monetary amount, which may be an important limitation to their application to the purchase of copies of copyright works such as musical recordings or films.²³⁴ Of particular relevance to commercial copies of copyright works, other restrictions limit the application of information disclosure requirements to materials downloaded from the Internet, on the basis that those materials can be instantaneously enjoyed by consumers.²³⁵ Similar information disclosure requirements exist in the European Union,²³⁶ the UK,²³⁷ and in France.²³⁸ As part of those

²³¹ This is the case of the provinces of Ontario (*OCPA*, *supra* note 18), Québec (*QCPA*, *supra* note 18) British-Columbia (*BCBPCPA*, *supra* note 194), Alberta (*AFTA*, *supra* note 203), Manitoba (*MCPA*, *supra* note 40), Saskatchewan (*SCPA*, *supra* note 33), Nova Scotia (*NSCPA*, *supra* note 40) and New Foundland and Labrador (*NLCPBPA*, *supra* note 194).

²³² *OCPA*, *supra* note 18, s 38 (1); *O. Reg. 17/05*, s 32 (1). Similar provisions are found in The *QCPA*, *supra* note 18, at s 54.4 (d); *BCBPCPA*, *supra* note 194, s 46(1) (c); *Fair Trading Act Internet Sales Contract regulation*, *Alta Reg. 81/2001*, s 4(1) (a) (iv); *NLCPBPA*, *supra* note 194, s 30(2) (a) and s 29 (1) (C); *MCPA*, *supra* note 40, s 129(1); *Man. Reg. 176/2000*, s 3(1) (d); *SCPA*, *supra* note 33, s 75.52(1); *Sask. Reg. 2/2007*, s 7(d).

²³³ *OCPA* *supra* note 18, s 38(1); *O. Reg.*, *supra* note 232, s 32(14). Similar provisions are found in the *MCPA*, *supra* note 40, s 129(1); *Man. Reg.*, *supra* note 232, s 3(1) (m); *QCPA*, *supra* note 18, s 54.4 (l); *SCPA*, *supra* note 33, s 75.52(1); *Sask. Reg.*, *supra* note 232, s 7(p); *Alta Reg.*, *supra* note 232, s 4(1) (a) (xiii).

²³⁴ Minimum monetary amounts apply in several jurisdiction (\$50.00): *OCPA* *supra* note 18 s 37; 2002 *O. Reg.*, *supra* note 232, s 31; *SCPA*, *supra* note 33, s 75.5(e) (i); *Sask. Reg.*, *supra* note 232, s 6; *Alta Reg.*, *supra* note 232 s 1 (d) (i).

²³⁵ *NSCPA*, *supra* note 40, s 21W.

²³⁶ *Directive 2011/83/EU*, *supra* note 6. This directive applies to contracts concluded after 13 June 2014: *Ibid*, art. 28 (2). It provides at article 5 (1) a) and article 6 (1) a) that before the consumer is bound by the contract, the trader shall provide the consumer “(a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services”. EC, *Parliament and Council, Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts*, [1997] O.J. L144/19, which is repealed by Directive 2011/83/EU on consumer rights, imposes a similar obligation at article 4 1. (b): “In good time prior to the conclusion of any distance contract, the consumer shall be

information disclosure requirements, *Directive 2011/83/EU* on consumer rights specifies that traders shall provide to consumers, before they are bound by a contract, information regarding the functionality, the presence of technological protection measures, and interoperability requirements.²³⁹ Prior to the adoption of this directive, there was a debate in Europe as to whether the information disclosure requirements required traders to disclose this information.²⁴⁰

If the supplier fails to provide the required information, consumers have the right to cancel the agreement, usually within a very short timeframe.²⁴¹ The EU regime provides an exception to this right of withdrawal in respect of contracts for “the supply of sealed audio or sealed video recordings or sealed computer software which were unsealed after delivery,” as means to provide stronger protection for copyright holders, based on the fear that consumers could inappropriately use their right to cancel the agreement while making unlawful copies of the copyright work they accessed prior to cancellation.²⁴²

In the US, the *Uniform Computer Information Transactions Act [UCITA]*²⁴³ is a model of state contract law that was proposed as an amendment to the US UCC.²⁴⁴ It takes a different approach from

provided with the following information: (...) (b) the main characteristics of the goods or services.” In *Content Services Ltd v Bundesarbeitskammer*, Case C-49/11, 2012 ECR, the Court of Justice of the E U held that the business practice of posting a hyperlink on the supplier’s website failed to fulfill the requirements under Article 5(1) of Directive 97/7 to supply information to consumers as is required under that directive.

²³⁷ Consumer Protection (Distance Selling) Regulation 2000, U.K., SI 2000/2334, as amended, [UKCPDSR] regulation 7 1 (a) (ii).

²³⁸ In France, the information disclosure requirements are not limited to certain forms of agreements. They generally apply to all contracts. *Code de la Consommation*, art L.111-1 and L.111-2 require professional sellers to inform consumers, prior to the conclusion of the contract, of the essential characteristics of the good and service respectively.

²³⁹ *Directive 2011/83/EU*, *supra* note 6, art 5(1) g) & h), art 6(1) r) & s).

²⁴⁰ Loos & al, *supra* note 7 at 158. In this report, the authors analysed the laws of 11 countries mainly in Europe, including the UK and France, and also the US.

²⁴¹ *QCPA*, *supra* note 18, at S 54.8; *MCPA*, *supra* note 40, s 129 (1); *SCPA*, *supra* note 33, s 75.61(1); *BCBPCHA*, *supra* note 194, s 75.61(1); *Alta Reg.*, *supra* note 232, s 6 (1); *NLCPBPA*, *supra* note 194, s 32(1). *Directive 2011/83/EU*, *supra* note 6, art 9 (1) (this Directive applies to contracts concluded after June 13, 2014); *Distance Contracts Directive 97/7/EC*, *supra* note 236 (which is repealed by *Directive 2011/83/EU*, *supra* note 6, article 6(1); *UKCPDSR*, *supra* note 237, regulation 10 and 11; *Code de la Consommation*, art L. 121.20, L. 121.19.

²⁴² *Directive 2011/83/EU*, *supra* note 6, art 16 (i)(which applies to contracts concluded after June 13, 2014); *Directive 97/7/ECs*, *supra* note 236, article 6(3) (which is repealed by *Directive 2011/83/EU*; *UKCPDSR*, *supra* note 237, regulation 13 (1) (d); *Code de la Consommation*, art L.121-20-2 4°.

²⁴³ Official Text, *Uniform Computer Information Transactions Act* (2002), online: <http://www.law.upenn.edu/bll/archives/ulc/ucita/2002final.htm> [UCITA].

the information disclosure requirements of the provinces and territories of Canada and the other jurisdictions examined here. For instance, under *UCITA*, suppliers are not obligated to provide the terms of the contract to consumers before payment occurs; rather, “an opportunity” to review the terms needs to be in place and, in such cases, be accompanied by the “right of return.”²⁴⁵ This has been invoked as one of the main flaws of *UCITA* which has met fierce resistance from various interest groups and commentators.²⁴⁶ The proposal of *UCITA* as an amendment to the US UCC²⁴⁷ was withdrawn in 2002 due to a lack of consensus as to its application by the states. *UCITA* has only been adopted in two states.²⁴⁸

Of all the consumer protection obligations examined so far, information disclosure requirements are the least intrusive to suppliers’ freedom of contract. They do not impose any minimum standard, as is the case with statutory implied obligations,²⁴⁹ or scrutinize the fairness or conscionability of the terms imposed by suppliers, as is the case for prohibitions against unfair practices.²⁵⁰ If suppliers disclose the information in the manner prescribed, they are in compliance with the statutory consumer protection obligation. The remedies for breach of these disclosure requirements are also more limited than with respect to the statutory implied obligations and provisions against unfair terms. In the cases

²⁴⁴ The National Conference of Commissioners on Uniform State Laws proposed *UCITA*, *ibid*, as a model state law to amend the existing *US UCC*, *supra* note 12.

²⁴⁵ *UCITA*, *supra* note 243, s 112-113. The “right of return” is subject to some exceptions: *ibid*, s 113(c).

²⁴⁶ For a discussion of *UCITA*, *supra* note 243, see Gail E. Evans, “Opportunity Costs of Globalizing Information Licenses: Embedding Consumer Rights within the Legislative Framework for Information Contracts” (1999) 10 *Fordham Intell. Prop. Media & Ent. L.J.* 267; Deborah Tussey, “UCITA, Copyright and Capture” (2003) 21 *Cardozo Arts & Ent. L.J.* 319; Niva Elkin-Koren, “A Public-Regarding Approach to Contracting over Copyrights”, in Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First eds., *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001) at 191. Jacques De Werra, “Moving Beyond The Conflict Between Freedom Of Contract And Copyright Policies: In Search Of A New Global Policy For On-Line Information Licensing Transactions” (2003) 25 *Colum. J.L. & Arts* 239, at 295ff; Jean Braucher, “12 Principles for Fair Commerce in Mass-Market Software and Other Digital Products” in *Consumer Protection in the Age of the “Information Economy”*, (Aldershot: Ashgate Publishing Ltd., 2006), online: <http://ssrn.com/abstract=730907>. Commentators supporting the model proposed by the *UCITA*, *supra* note 243, include: Richard Epstein “Contract, not Regulation: “UCITA and High-Tech Consumers Meet Their Consumer Protection Critics”, in *Consumer Protection in the Age of the “Information Economy”*, (Aldershot: Ashgate Publishing Ltd., 2006).

²⁴⁷ *Supra* note 12.

²⁴⁸ *UCITA* online, A commercial code for the information age?: <http://www.ucitaonline.com/>. For a chronological history of *UCITA*, *supra* note 243, see AFFECT, Americans for Fair electronic transactions, online: http://www.ucita.com/what_history.html. The State of Virginia and of Maryland have adopted *UCITA*, *ibid*: *Va. Code Ann. §§ 59.1-501.1 to -509.2* (2005), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+59.1-501.1>; *Md. Code Ann., Comm. Law §§ 22-101 to -816* (LexisNexis 2005).

²⁴⁹ As this is discussed in Part II A. of this chapter.

²⁵⁰ See the discussion in Part III of this chapter.

where the information disclosure requirement applies to a breach that touches upon the scope of permitted use of copies of copyright works, the consumer is not in a position to require that the relevant use be allowed through specific performance. Nor is the existence of information disclosure requirements likely to alter suppliers' behaviour in the marketplace, through, *inter alia*, expanding the scope of permitted use. All that the information disclosure provisions require is that the information on the rights and obligations of the contract be disclosed to consumers. While information disclosure requirements bear relevance to commercial transactions of copies of copyright works as a core legal tool of consumer protection law and a manifestation of its underlying theoretical justifications and goals,²⁵¹ their appeal in the context of the present discussion remains more limited than the other consumer protection obligations examined so far.²⁵² I will analyze the theoretical justifications of information disclosure requirements and apply them to specific scenarios involving different uses of copies of copyright works in Chapter 10 and in Chapter 11. Before doing so, I will turn to a specific aspect of information disclosure requirements that revolves around the quality of the information that needs to be disclosed.

B. General requirements of quality of information disclosed

The breach or not of the consumer obligations examined here (e.g., implied obligations,²⁵³ prohibitions of unfair practices, and information disclosure requirements) depends to some extent on the quality of the information that suppliers bring to the attention of consumers. Although not determinant in all cases, the nature, quality of, and manner by which the information is disclosed to consumers play an important role in establishing a breach of or compliance with consumer protection obligations. Information properly brought to the attention of consumers minimizes occurrences of deceit and can demonstrate that consumers had the necessary tools to make an enlightened decision. In other words, on the basis of the information specifically brought to the attention of consumers, a court can infer that this is what consumers should reasonably expect and that no breach of a consumer implied obligation, or in some cases no unfair practice, occurred.

²⁵¹ The theoretical justifications of information disclosure requirements are discussed in Chapter 10.

²⁵² I apply information disclosure requirements to four scenarios involving copies of copyright works in Chapter 11.

²⁵³ I.e. implied obligations of quality, fitness for purpose, correspondence with description, title, quiet possession and of freedom from encumbrances.

A question arises on the extent to which non-negotiated standard end-user agreements, prevalent in the online distribution of digital copies of copyright works, satisfy the requirements of specifically bringing information to the attention of consumers. This question raises issues about the opposability and enforceability of online contract terms. There is no uniform answer to that question although certain factors will be taken into account to determine whether the parties agreed to enter into a binding agreement.²⁵⁴ At the same time, in a consumer protection law analysis, contract terms have a relative value in assessing, *inter alia*, whether an implied obligation was breached or not. Because the application of implied obligations that are based on a “consumers’ reasonable expectation test” relies on a non-exhaustive list of factors (as is the case in some jurisdictions in Canada and elsewhere), the effect that the standard terms will have in discarding a breach of the implied obligations is likely to vary. From that, the presence of non-negotiated standard end-user agreements is not, in and of itself, always sufficient to meet the requirement of bringing information specifically to the attention of consumers.²⁵⁵ By contrast, clear short notices on packaging, or that have to be specifically acknowledged through online transactions, are more likely to satisfy the requirement that they are brought specifically to the attention of consumers.²⁵⁶

To sum up, the degree of information disclosed by suppliers plays a pivotal role in the various consumer protection obligations explored here. To some degree, the information supplied can defeat claims alleging breach of implied obligations or other consumer obligations. What is less clear is the nature and quality of information that can fulfill that role, including the extent to which lengthy non-negotiated terms and conditions can amount to adequate disclosure. The more specific information disclosure requirements obligations that pertain to certain forms of consumer agreements are of less appeal: their limited scope makes them inapplicable to a large segment of commercial transactions that involve copies of copyright works, and the remedies available in case of breach are more limited than those related to the other consumer protection obligations examined in this chapter.

²⁵⁴ See Loos et al., *supra* note 7, where the authors looked at the application of consumer protection law to digital product contracts in 11 jurisdictions (mainly European, and also the US), at 65-66: “The intention of a party to enter into a binding legal relationship or bring about some other legal effect is to be determined from the party’s statements or conduct as they were reasonably understood by the other party. Consent is presumed to have been given if two conditions are met: first, the trader has to indicate to the consumer that license terms are applied; and second, the consumer has to be offered a reasonable possibility to examine the terms before or at the time of concluding the transaction.”

²⁵⁵ *Ibid.*

²⁵⁶ See *Sony France and Sony UK*, *supra* note 219, where in a case involving misleading commercial practices, the Court ordered Sony France to place a notice forthwith on its MP3 players that specifically mentioned the use restrictions of the MP3 players.

V. Conclusion

In this chapter, I laid the groundwork for the application of consumer protection law to commercial transactions of copies of copyright works. The starting proposition is that restrictions on lawful consumers' uses of commercial copies of copyright works (through the application of the *CCA* and any existing contract) need to be scrutinized through the lens of sellers' implied obligations, prohibitions against unfair practices, and information disclosure requirements. Beyond obvious cases of malfunction (e.g., of computer software functionality or technological protection measures causing damage to users' equipment) the interaction between these consumer obligations and copyright has been relatively little explored. This may be because of the underlying assumption that because copyright law confers powers and privileges on copyright holders to restrict others from doing certain acts with their works, they are *prima facie* legitimized in imposing those restrictions on consumers. What needs to be explored further is the extent to which consumer law, through the commercial transaction that takes place between copyright holders and consumers, imposes limits on how copyright holders exercise those powers and privileges.

First, I described which of consumer law's unique features are of particular appeal to copyright consumers. In particular, I looked at those mechanisms of consumer law that can provide ammunition to counterbalance what I described in the First Part and in the Second Part of my thesis as the copyright-holder-centric regime of copyright law, as amplified through copyright holders' commercial practices. One of the most striking components of consumer law is the mandatory nature of implied obligations in most jurisdictions in Canada, as well as of prohibitions against unfair practices and information disclosure requirements. In addition, the relative nature of contracts as one of the factors to take into consideration to assess whether sellers' implied obligations of quality or fitness for purpose have been breached²⁵⁷ offers a possible counterbalance to the asymmetric powers that result from non-negotiated standard end-user agreements increasingly prevalent with respect to commercial copies of copyright works that are distributed online. Other features, including the ease of certain evidentiary and procedural rules, are a reminder of the gains that consumers made through statutory consumer protection, relative to the existence of similar general obligations at common law, that facilitates how consumers can establish their claim.

²⁵⁷ That is, in those jurisdictions that base the application of these implied obligations on consumers' reasonable expectations: see the discussion above in this chapter in Part II A.

Second, I looked at the nature and scope of consumer protection obligations to develop arguments stemming from the alteration that the commercial relationship between consumers and copyright holders creates on the copyright holder–copyright user relationship. On that basis, arguments are taking shape on how consumers can assert their claims against restrictions on their use of commercial copies of copyright works, on the basis of their reasonable expectations (in some jurisdictions, through the application of implied obligations) and on the basis of fairness (through the application of the prohibitions against unfair terms and the investigatory and remedial powers of some consumer protection agencies). Based on the relevant jurisprudence, I argued that the implied obligations of title and of quiet possession offer the base of a cogent argument to assert specific copyright users' rights under copyright law when overridden by contract, and with respect to technological protection measures and digital rights management. I also argued that implied obligations of quality and fitness for purpose offer a legal basis to advance consumers' claims against restrictions on use of copyright works in those jurisdictions where the requirement to meet consumers' reasonable expectations is built into the implied obligations of quality and fitness for purpose. I also argued that jurisdictions that apply a latent defects' analysis to implied obligations of quality and fitness for purpose make them narrower in their application and less likely to provide a solid ground for consumers' claims with respect to the permitted scope of use of copyright works. Prohibitions of unfair commercial practices offer avenues of redress to consumers against copyright holders who commercialize copyright works through non-negotiated standard end-user agreements that disregard users' rights under copyright law or that misrepresent the scope of copyright holders' exclusive rights in a way that is misleading to consumers. Finally, I described how information disclosure requirements are a pillar of consumer law that has ramifications over consumer protection obligations, taken as a whole.

The legal foundations that I laid out in this chapter for the potential applications of consumer law to assert consumers' permitted uses of copies of copyright works will be tested through various scenarios in Chapter 11. Prior to that, I will look at the various theoretical justifications of the consumer protection obligations examined in the present chapter and the extent to which they can provide additional arguments in favour of the application of consumer protection obligations to commercial copies of copyright works.

Chapter 10

The Justifications and Role of Consumer Protection Law Obligations

I. Introduction

In the previous chapter, I paved the way for the application of consumer law obligations¹ to ascertain consumers' rights against restrictive uses of commercial copies of copyright works. Because this interaction has been relatively little explored so far, I raised the uncertainties and also opportunities of applying consumer obligations successfully to strengthen consumers' rights to commercial copies of copyright works, as a counterweight to the copyright-holder-centric regime of copyright law.

In this chapter, I look at the various underlying justifications of consumer implied obligations (i.e., of quality, fitness for purpose, correspondence with description, title, and quiet possession), prohibitions against unfair commercial practices and information disclosure requirements, to better understand their role and how they relate to property, copyright, and contracts. What is the value of applying consumer obligations to strengthen consumers' rights to commercial copies of copyright works? Is there a relation between the alteration that consumer obligations effectuate on commercial transactions and the nature of the property of consumers in commercial copies and of copyright holders in copyright? What are the main debates about the regulation of consumers and how do they influence our preferences for one mean of state intervention in the name of consumers over another? Answering these questions will facilitate the application of consumer obligations to specific scenarios of commercial copies of copyright works in the next chapter.²

The most frequently invoked justification to protect consumers through, e.g., implied obligations (of quality and fitness for purpose, of correspondence with description, of title, quiet possession, and freedom from encumbrances), prohibition of unfair practices, and information disclosure requirements, is the need to address the detrimental effects of asymmetry between the consumer and the seller. More precisely, these legal mechanisms are grounded in the need to rectify asymmetry of

¹ I.e., implied obligations of quality, fitness for purpose, correspondence with description, title, quiet possession, prohibitions against unfair commercial practices and information disclosure requirements.

² I.e., Chapter 11.

information,³ of bargaining power,⁴ and in the resources available to remedy an unsatisfactory bargain.⁵ In behavioural economics theory terms, this would include the exploitation of known “behavioural biases” to the detriment of the consumer,⁶ intensified by the proliferation of standardized terms in mass-market transactions. The undesirable outcomes that can flow from the information asymmetries in consumer transactions vary from consumers’ deceit to outright abuse.⁷ In economic theory terms, those detrimental effects give rise to a “market failure.”⁸ A deceived consumer may lose confidence in the market place, which in turn jeopardizes one of the pillars of a thriving market.⁹

³ For example, see the Ontario *Consumer Protection Act*, S.O. 2002, c. 30, schedule A, [OCPA], ss 6, 38, 39- 40, which address issues of information asymmetry.

⁴ The lack of bargaining power of the consumer is reflected in provisions whereby any ambiguity is to benefit the consumer: OCPA, *supra* note 3, s. 11; Québec *Consumer Protection Act*, RSQ c. P-40.1 [QCPA], s 17. It is also reflected in the fact that certain rights granted under consumer protection law cannot be contracted out: OCPA, *supra* note 3, s 9(3); QCPA, *ibid*, ss 261 and 262. see also Geraint Howells & Stephen Weatherill, *Consumer Protection Law*, 2d ed. (Aldershot: Ashgate Publishing Ltd., 2005) at 6.

⁵ These asymmetries all converge towards the earlier justifications and origins of consumer protection law, which has become more prominent post World War Two as a field of law, when consumption of a wide array of goods and services became pervasive (consumerism or “la société de consommation”). Nicole L’Heureux, *Droit de la consommation*, 5^e édition (Cowansville, Qc: Yvon Blais, 2000) at 1- 4, describes mass production, the need to increase production through increased demand and the instrumental role that publicity play(s)(ed), where consumers become guinea pigs with less than perfect goods, even dangerous products, etc.. as the dynamics that needed and still need to be counterbalanced through adequate consumer protection.

⁶ For example, in the context of consumer credit, see: Oren Bar-Gill, “Seduction by Plastic” (2004) 98 Nw. U. L. Rev. 1373 at 1373 [Bar-Gill, “Seduction by Plastic”]. See also Oren Bar-Gill & Franco Ferrari, “Informing Consumers About Themselves” (2010) 3 *Eramus Law Review*, 93, where the authors argue that suppliers sometimes take advantage of consumers’ inaccurate perception of how they intend to use a product upon purchase (“use-pattern mistakes”) to the detriment of consumers and propose customized disclosure requirements to address this issue.

⁷ For example, QCPA, *supra* note 4, art 8, provides that: “The consumer may demand the nullity of a contract or a reduction in his obligations there under where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable.” See also L’Heureux, *supra* note 5, at 16-17.

⁸ As discussed below in Part II of this chapter, behavioural economic theory suggests that such market failures are pervasive. They are not a deviation from a thriving competitive market; rather, they are often its product.

⁹ Consumers’ confidence in the market place is one justification frequently invoked for European Union legislation to harmonize consumer protection laws. See EC, Council *Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, [1993] OJ L095, at 29 [Directive 93/13/EEC], Preamble and EC, Parliament and Council *Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council*, [2005] OJ L 149 at 29 [Directive 2005/29/EC], Preamble.

Consumer protection obligations seek to rectify various asymmetries to give effect to consumers' reasonable expectations, a basic underpinning of consumer protection law.¹⁰ This objective is well reflected in consumer implied obligations, which are based on late 19th century sale of goods law legislation,¹¹ which in turn was based on the common law.¹² The main purpose of implied obligations was to protect "honest contractors' reasonable expectations."¹³ Among those, the expectation of a fair market place is a strong underlying principle of consumer law.¹⁴

I described in Chapter 8 how the application of certain statutory consumer obligations, i.e., implied obligations, depended on the presence or not of a good and how this was problematic with respect to commercial copies of copyright works distributed online with no supporting physical medium.¹⁵ For the mechanisms to apply, designed to rectify asymmetries to give effect to consumers' reasonable expectations, the commercial transaction needs to involve a good. The relationship between statutory implied obligations, property and reasonable expectations needs to be explored further to shed some light on the underlying justifications of implied obligations.¹⁶

In Part II, I look at the debate that lies around consumer protection: i.e., whether market forces are better apt to address consumers' reasonable expectations or whether state intervention is justified and if so when and why. In Part III through V, I look at the theoretical justifications that withstand information disclosure requirements, prohibitions against unfair practices and implied obligations, respectively. I conclude in Part VI by finding the justification to rectify information and other asymmetries present in all consumer obligations and why commercial digital copies of copyright

¹⁰ Roger Bradgate, "Consumer rights in digital products" 2010, online: http://www.google.ca/search?sourceid=navclient&ie=UTF-8&rlz=1T4ADBF_enCA275CA275&q=Bradgate%2c+Consumer+rights+in+digital+products+2010 at 26, notes: "...if we look for core principles of consumer law, a strong case can be made suggesting that the basic underpinning is that the law should uphold and give effect to the reasonable expectations of the consumer; that for private law consumer protection to be effective, its rules must coincide with reasonable expectations of its consumers,..."

¹¹ I.e. the *Sale of Goods Act*, 1893 (UK) c. 71.

¹² Bradgate, *supra* note 10 at 18.

¹³ *Ibid.*

¹⁴ On the link between the legal interpretation tool of "reasonable expectation" and fairness, see Clarisse Girot, *User protection in IT Contracts: A comparative study on the protection of the user against defective performance in information technology* (The Hague: Kluwer Law International, 2001) at 33ff who argues that contracting parties can reasonably expect that contracts they enter into are not to operate unfairly. Bradgate, *supra* note 10 at 11.

¹⁵ See the discussion in Chapter 8.

¹⁶ See the discussion in Part V of this chapter.

works are more likely to give rise to intensified asymmetries than with respect to other goods. I also derive two insights from the relation between property, ownership, and the function of consumer implied obligations, i.e., how a solid understanding of the nature of digital copies of copyright works is critical to the application of implied obligations, and how we need to rethink their application to services.

II. Divergent approaches: market laissez-faire v. state intervention

The merit and effectiveness of the consumer protection legal mechanisms examined here, and in particular how they can help ascertain consumers' rights to copies of copyright works raises fundamental philosophical and regulatory design questions that oppose approaches favouring market laissez-faire to various degrees of state intervention.¹⁷ They raise issues that touch upon core values in our legal system,¹⁸ including freedom of contract¹⁹ and how consumers' autonomy and choice may be constrained by at least some of the consumer protection legal mechanisms examined here.²⁰ This has led Roger Brownsword to analogize the regulatory effects of consumer protection law to tort law more than contract law.²¹

¹⁸ As one illustration of how consumer protection law disturbs long established legal concepts and traditions, at the time of the reform of the Québec Civil Code in the nineties, Pierre- Claude Lafond, "Le code civil du Québec et la loi sur la protection du consommateur: un mariage de solitudes" (2010) 88 C.B.R. 407 at 408-410, describes the reluctance to include consumer protection provisions in the Québec Civil Code on the fear that it would disturb contractual stability, and suggests that this is perhaps due in part to the wave of liberalism that prevailed at the time.

¹⁹ Howells & Weatherill, *supra* note 4 at 14ff, provide an historical overview of the earlier justifications of freedom of contract, e.g., those based on individual freedom and the conception that it embedded safeguards preserving the mutual interest of both parties. They explain why freedom of contract has come to be perceived as no longer realistic in modern consumer transactions where the relationship between parties is typically imbalanced in favor of the supplier. Notions of free will, bargain and agreement in the context of consumer agreements are distorted given the prevalence of standard form agreements which are largely unread. L'Heureux, *supra* note 5, at 16-18, describes consumer law as the recognition of the breakdown of the presumed balance within contract ("rupture de l'équilibre contractuel") and as the "revitalization" of contractual fairness ("justice contractuelle").

²⁰ The notion that consumers' choice and autonomy are restricted by state intervention includes the line of argument by which state intervention in the name of weaker consumers ends up limiting choices for all and places a burden on the informed consumer who ends up paying the for the costs of interventionism in their favour. See Jane Winn, "Introduction: Is Consumer Protection an Anachronism in the 21st Century?" in *Consumer Protection in the Age of the "Information Economy"* (Aldershot, England: Ashgate, 2006) 1 at 2.

²¹ Roger Brownsword, "Regulating Transactions: Good Faith and Fair Dealing" in Geraint Howells & Reiner Schulze eds., *Modernising and Harmonising Consumer Contract Law* (Sellier: European Law publishers, 2009): "...for all practical purposes, consumer transactions are regulated, much as the law of tort regulates our interactions. There is nothing voluntary about the assumption of obligation; it is imposed.

Geraint G. Howells and Stephen Weatherill summarize the spectrum of approaches to consumer protection theory as spanning at one end, from the position that markets are not just. This justifies state intervention and interference in the market, with little regard to individual consumer freedoms as they are expressed through market transactions. At the other end of the spectrum, markets are sacred, and states should only intervene to rectify an identified market failure.²²

The least interventionist approach, supported *inter alia*, by certain law and economics commentators, is based on the premise that through market forces, industry participants are better positioned than the state could ever be to respond to consumer needs and more readily adaptable and flexible.²³

Generally, limits should be placed on the ability of states to interfere with private economic freedom.²⁴ A law and economics approach to consumer protection seeks to identify the “bad deals”²⁵ for consumers, looking at the substance of the transaction while not making normative judgments as to what consumers may want.²⁶

The more interventionist approach is justified as Thierry Bourgoignie notes, on the basis that consumers share “collective interests that are specific and distinct from the general or public interests, in the same way as the social order has recognized and seeks to ensure the defense of other collective

..... so far as suppliers, in particular, are concerned this is simply a regime of command and control regulation.”

²² Howells & Weatherill, *supra* note 4 at 7.

²³ See Michael J. Trebilcock, “Rethinking Consumer Protection Policy,” in Charles E. F. Rickett and Thomas G.W. Telfer, eds, *International perspectives on consumer access to justice* (Cambridge: Cambridge University Press, 2003) 68 at 77 who argues that the state should only intervene where market solutions are likely not to be present; Richard A. Epstein, “Exchange, The Neoclassical Economics of Consumer Contracts” (2008) 92 Minn. L. Rev. 803 [Epstein, “Consumer Contracts”].

²⁴ Howells & Weatherill, *supra* note 4 at 7; See for example Richard A. Epstein, “Contract, not Regulation: “UCITA and High-Tech Consumers Meet Their Consumer Protection Critics,” in *Consumer Protection in the Age of the “Information Economy,”* (Aldershot, England: Ashgate Publishing, 2006) [Epstein, “Contract not Regulation”] and more specifically at 10, where the author argues that the generalized use of similar standard terms and conditions is indicative of the fairness of such terms.

²⁵ Gillian.K. Hadfield, Robert Howse & Michael J. Trebilcock, “Information –based principles for rethinking consumer protection policy” (1998) 21 Journal of Consumer Policy, 131 at 132 would phrase it as follows: “Are consumers being charged prices that exceed average cost? Are they being discriminated amongst on the basis of criteria, such as wealth, class, race or gender, unrelated to cost? Are they obtaining goods and services that are defective in some way for which they did not bargain? Are they being offered a range of goods of differing quality so that they can make trade-offs between price and quality? Are they being offered goods and services on terms that they understand, want and have some choice about?”

²⁶ *Ibid.*

interests...”²⁷ Because consumer interests are more diffuse than other groups, state intervention is justified to ensure the better promotion and protection of those interests.²⁸ Most if not all citizens are consumers at any given time of their life. Consumer law theory and, in particular, behavioural economics applied to law, teach us that rather than a small group of marginalized individuals, all consumers are likely to be vulnerable at some point, in varying degrees.²⁹

The justification of state intervention to protect consumers has distributive justice underpinnings, i.e., that it would be justified “that a cost be placed on society generally to support an identified disadvantaged group”³⁰ in specific contexts to promote specific societal values and goals (such as access to information, autonomy, education, freedom of expression) that can also go beyond the need to fix a targeted market inefficiency.³¹ Howells and Weatherill observe that wealth maximization and wealth distribution need not be mutually exclusive in the endeavour, through state regulation, to have a “more just market and a more harmonious society.”³² Consumer protection can contribute to thriving markets by giving consumers more confidence in the market place.³³

Distributive justice arguments are particularly à propos in the context of consumers’ expectation regarding standards of quality, fitness for purpose, and quiet possession with respect to copies of copyright works. The allocation of the proper scope of users’ rights (and the underlying values that they promote)³⁴ run against the scope of the economic rights of copyright holders and their power and prerogative to dictate their scope through private ordering.³⁵ In some cases, state intervention to

²⁷ Thierry Bourgoignie, “Characteristics of Consumer Law” (1992) 14 *Journal of Consumer Policy*, 293 at 299.

²⁸ Howells & Weatherill, *supra* note 4 at 16-17.

²⁹ See the discussion further below in Part II of this chapter.

³⁰ For a discussion on distributive justice considerations in consumer law, see: Howells & Weatherill, *supra* note 4 at 51-52.

³¹ *Ibid.* On Amir & Orly Lobel, “Stumble, predict, nudge: how behavioural economics informs law and policy”, Book Review of *Nudge: improving decisions about health, wealth, and happiness*, by Richard H. Thaler and Cass R. Sunstein & *Predictably irrational: the hidden forces that shape our decisions*, by Dan Ariely (2008) 108 *Colum. L. Rev.* 2098 discuss the redistributive effect of regulatory intervention for the benefit of consumers: “If government intervenes to help consumers become more sophisticated about their lending, saving, and spending, corporations will lose money. Credit card and mortgage brokers have long studied market failures as part of their marketing task forces.”

³² Howells & Weatherill, *supra* note 4 at 98.

³³ Bradgate, *supra* note 10 at 11.

³⁴ See the discussion on justifications for consumers’ ownership rights to copies of copyright works in Chapter 6 Part III.

³⁵ David McGowan, “Some Copyright Consumer Conundrums” in *Consumer Protection in the Age of the “Information Economy”* (Aldershot, England: Ashgate Publishing, 2006) 155 at 165 notes that the main

protect consumers can be founded on the need to address vulnerabilities to the respect of fundamental values. The same values are sometimes raised to justify opposite approaches. On the one hand, consumer freedom and autonomy is often invoked by suppliers to justify less state intervention to protect consumers. Indeed, the effect of consumer protection intervention is precisely to limit freedom of contract, based on the assumption that private law notions of free will, bargain, and agreement are distorted in the context of consumer transactions.³⁶ On the other hand, the need to protect the weaker parties' abilities to exercise their freedom and autonomy, including freedom to access information, privacy and non-discrimination, is invoked to justify increased state intervention.³⁷ This is even more so with the proliferation of standard form agreements. State intervention becomes justified to avoid the effects of freedom of contract that have "effectively converted big firms into legislators in the market."³⁸

Implied obligations mechanisms are one example where the state intervenes to limit freedom of contract by imposing minimum standards.³⁹ In this case and others, state intervention is justified under the assumption of the instrumental value of certain legal mechanisms to shape the behaviour of suppliers towards a specific conduct.⁴⁰ By doing so, the state does not only favour consumers, but seeks to influence behaviours that will benefit all market participants.⁴¹

economic purpose of the Copyright Act being to give authors a chance to (not a guarantee that they can) price their works above marginal costs, "a policy goal that explicitly contemplates wealth transfers from consumers to producers."

³⁶ Even more so with the proliferation of standard form agreements. State intervention becomes justified to avoid that "freedom of contract has effectively converted big firms into legislators in the market": Howells & Weatherill, *supra* note 4 at 18-19.

³⁷ In order to preserve consumers' freedom of choice, state controls are required against unfair practices: *Directive 2005/29/EC*, *supra* note 9, Preamble, Recital 16 "The provisions on aggressive commercial practices should cover those practices which significantly impair the consumer's freedom of choice. Those are practices using harassment, coercion, including the use of physical force, and undue influence."; Chantal Mak, "Fundamental rights and the European regulation of consumer contracts" (2008) 31 J. Cons Law Policy 425 at 433.

³⁸ Howells, & Weatherill, *supra* note 4 at 18, 19.

³⁹ *Ibid* at 29-30. See also Peter Rott, "Download of Copyright-Protected Internet Content and the Role of (Consumer) Contract Law" (2008) 31 J. Consum. Policy 441 at 452: "Mandatory rules in sales law would set limits to party autonomy, in safeguarding a minimum quality of the product that cannot be abrogated by contract."

⁴⁰ Brownsword, *supra* note 21: "...the crucial point is that the regulatory environment for consumer transactions is dominated by a range of imposed standards that are designed to channel suppliers towards a particular pattern of dealing."

⁴¹ The benefit of all market participants beyond consumers is often invoked in European Union secondary law on consumer protection. See for example *Directive 2005/29/EC*, *supra* note 9, Preamble, Recital 8: "This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who

Between market laissez-faire and greater state intervention, behavioural economics theory applied to law, questions basic assumptions made in economic theories to support self-reliant efficient markets to justify in turn the least state intervention.⁴² While not completely rejecting the insights of law and economics on state regulation and state intervention, it revisits some of the underlying assumptions of economic theory, including the fact that consumers behave rationally.⁴³ In their book *Nudge, Improving Decisions About Health, Wealth, and Happiness*,⁴⁴ Richard H. Thaler and Cass R. Sunstein justify a refined form of state intervention⁴⁵ – a “nudge” – that can improve welfare without reducing freedom, a compromise that they coin as “libertarian paternalism.”⁴⁶

The new insights of behavioural economics approaches to law point to a less than perfect market place and rekindle with the need for state intervention in specific cases: “The behavioral insights enormously expand the world of imperfect information. Once one accepts that many of our decisions are based on imperfect, biased, and inaccurate calculations of expected benefits and costs, then it becomes clear that market failure is pervasive.”⁴⁷ Research based on behavioural economics theory in a specific segment of the industry⁴⁸ suggested that abusive contract clauses were not the result of imperfect competition. On the contrary, competitive forces encourage sellers to take advantage of consumers’ weaknesses.⁴⁹ For Thaler and Sunstein, “‘Nudge’ is the real third way between absolute laissez-faire and rigid one size fits all intervention plans. Governments, just as much as the private sphere can incent people to make the right decisions, while still preserving freedom of choice.”⁵⁰

do not play by the rules in this Directive and thus guarantees fair competition.”; see also, L’Heureux, *supra* note 5 at 5.

⁴² Cass R. Sunstein, ed., *Behavioral Law and Economics* (Cambridge: Cambridge University Press, 2000).

⁴³ See also Bar-Gill, “Seduction by Plastic”, *supra* note 6 at 1373. In that article, the author discusses how behavioural economics research shows that not only consumers do not behave rationally but that some firms are well aware of certain behavioural patterns and are exploiting them to their advantage.

⁴⁴ Richard H. Thaler and Cass R. Sunstein, *Nudge: improving decisions about health, wealth, and happiness* (New Haven: Yale University Press, 2008).

⁴⁵ I.e., one that relies on sophisticated set of default rules and associated choice architecture.

⁴⁶ Thaler and Sunstein, *supra* note 44 at 4-6, 13, 72: “paternalism” refers to well-orchestrated intervention through (default rules) incenting choices that will promote health, wellbeing, happiness; the “libertarian” part implies that it should be associated with cost-free ways to opt out to respect individual freedom.

⁴⁷ Amir & Lobel, *supra* note 31 at 2109-2110.

⁴⁸ In this particular case, consumer credit: Bar-Gill, “Seduction by Plastic”, *supra* note 6.

⁴⁹ Bar-Gill, “Seduction by Plastic”, *supra* note 6 at 1373; Thaler & Sunstein, *supra* note 44 at 77-80.

Justifications of state intervention to protect consumers vary based on the conception of consumers' role and place within the legal design. Are they economic agents, an integral component of a robust market economy or are they more broadly citizens,⁵¹ the consumption acts of which touch upon fundamental values that a just and modern society needs to protect in that specific context, given its overwhelming pervasiveness? A less interventionist approach seems to favour the former while more intervention may be justified by promoting the latter.⁵²

While policy makers in the area of consumer protection often rely on economic arguments to justify state intervention and may reflect narrower views of the underlying reasons for the protection of consumers, there are indications of broader considerations that are not strictly founded upon the promotion of dynamic markets and economic efficiency arguments. As Colin Scott argues, regardless of influential non-interventionist regulatory models, there will always remain strong political impetuses towards some form of state intervention in the name of consumers.⁵³

The least interventionist of the consumer protection mechanisms explored here are information disclosure requirements. Next, and arguably on an equal footing, are the prohibitions against unfair

⁵⁰ Thaler & Sunstein, *supra* note 44 at 253. For a critical view of behavioural economics applied to law see: Richard A. Epstein, "Behavioral Economics: Human Errors and Market Corrections" (2006) 73 U. Chi. L. Rev. 111 [Epstein, "Behavioral Economics"].

⁵¹ Marco B.M. Loos, Natali Helberger, Lucie Guibault, Chantal Mak, Lodewijk Pessers, Katalin J. Cseres, Bart van der Sloot, Ronan Tigner, "Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts" (2011) University of Amsterdam, Centre for the Study of European Contract Law (CSECL), Institute for Information Law (IViR), Amsterdam Centre for Law and Economics (ACLE), online: http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.html, at 19 discuss views opposing "consumers" and "citizens" and others seeing no incompatibility between the two.

⁵² The *Treaty on the functioning of the European Union*, consolidated version [2010] O.J.E.U., C-83/49, art. 169, paragraph 1 addresses the need for consumer protection as follows: "In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests." Howells & Weatherill, *supra* note 4 at 98 view consumer law within the broader scope of shaping society.

⁵³ Colin Scott, "Enforcing Consumer Protection laws" in Geraint Howells, Iain Ramsay, and Thomas Wilhelmsson (eds), *Handbook of Research on 'International Consumer Law* (Cheltenham, UK: Edward Elgar, 2010) at chapter 18. Scott looked at enforcement of consumer protection as performed by public agencies mostly since the fifties, to analyze the extent to which we have entered a post-interventionist phase in the 1980s. For the author, such a claim cannot be supported. Scandal or scare (for example food safety) will usually incite state intervention. Also the author points to the inherent vulnerability in non-state governance, even in countries who are averse to state intervention, such as the U.S.

practices and the (mandatory) application of implied obligations.⁵⁴ From a property theory perspective, information disclosure requirements are the least supportive of consumer open-ended powers and privileges, and implied obligations offer greater potential for supporting consumer expectations as lawful owners or possessors.⁵⁵ They fill the gaps of unclear consumer agreements or strengthen their effects when they run counter to those fundamental open-ended ownership freedoms.⁵⁶ Prohibitions against unfair practices can also have this effect but their application is limited to a more restrained scope of commercial transactions.⁵⁷

A few remarks are in order with respect to the theoretical justifications that are more specific to information disclosure requirements and prohibitions against unfair commercial practices that I discuss briefly. Because of their broader scope and ramifications to the ascertainment of the scope of use of copies of copyright works, more attention is devoted to the theoretical justifications of consumer protection law implied obligations, which I address afterwards.

III. The justifications for information disclosure requirements

Information disclosure requirements are one of the first legal mechanisms that may come to mind to rectify the information asymmetry that subsists between suppliers and consumers.⁵⁸ In Canadian provinces and territories, and some of the jurisdictions examined here, they are imposed for certain categories of (or all) contracts including “distance contracts” and “Internet agreements.”⁵⁹

That consumers ought to have access to material information prior to entering into a contract is the condition *sine qua non* to validly consenting to a bargain.⁶⁰ The information disclosure requirements provisions and the remedies available to consumers in case of breach, take into account the altered

⁵⁴ The consumer implied obligations are discussed in Part V of this chapter.

⁵⁵ The ability of implied obligations to support core expectations as owner of a resource is discussed in more detail further below in Part V B of this chapter.

⁵⁶ *Ibid.*

⁵⁷ The nature and scope of unfair practices is discussed in Part III of this chapter.

⁵⁸ Geraint Howells, “The Potential and Limits of Consumer Empowerment by Information” (2005) 32 *Journal of Law and Society*, 349 at 354. As there may be a lack of incentives for producers to supply the information, the law requires it: *ibid.* Girot, *supra* note 14 at 66 describes the compulsory provision of information as “a core method of protection of consumer law” that is in constant expansion.

⁵⁹ The consumer protection information disclosure requirements are discussed in Chapter 9 Part IV.

⁶⁰ One justification for information disclosure requirements is the lack of consent that results from the information being withheld: *QCPA*, *supra* note 4, art 8; *Centre Hospitalier de Ste-Marie, v Perron* J.E. 89-567 (CQ).

environment within which consumers agree to a commercial transaction. The policy rationale behind specifically requiring distributors to supply information in distance contracts and Internet agreements is to minimize the potential vulnerabilities for consumers created by remoteness and the transient nature of the Internet.⁶¹ It also recognizes the additional vulnerabilities that may result from the environment in which consumers may enter into such agreements, i.e., outside traditional commercial environments.⁶²

Independently of whether consumers actually choose to consume the information or not, or of their ability to absorb the information, under the premise of required valid consent, suppliers should make that information available to potential buying consumers. It promotes transparency,⁶³ fairness⁶⁴ and subject to certain parameters being maintained on the instances and on the level of information required,⁶⁵ efficiency in the market place.⁶⁶ It reinforces a legitimate expectation that consumers and the market will be better off with informed rather than misinformed consumers.⁶⁷ It also places a

⁶¹ In a European Union context, see EC, *Parliament and Council Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts*, [1997] O.J. L144/19, Preamble, Recitals (11) and (13) [*Directive 97/7/EC*]. This directive has been repealed by EC, *Council and Parliament Directive 2011/83/EU of 22 November 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council* OJ [2011] L 304/64 [*Directive 2011/83/EU*]. *Directive 2011/83/EU* seeks to bring a further level of integration regarding information disclosure requirements, formalities and remedies for distance contracts, off-premises contracts and other contracts.

⁶² *Ibid.*

⁶³ The *OCPA*, *supra* note 3, s 5(1), states that “If a supplier is required to disclose information under this Act, the disclosure must be clear, comprehensible and prominent.”

⁶⁴ One of the arguments made for requiring that information be provided prior to the conclusion of the contract is to protect consumers against their own impulsiveness and the sale dynamics at play before they make a decision: L’Heureux, *supra* note 5 at 275.

⁶⁵ For example, the information disclosure requirements in consumer protection legislation often only apply to contracts over and above a certain amount: *OCPA supra* note 3 s. 37; O. Reg. 17/05, s 31 (\$50.00).

⁶⁶ A law and economics perspective to the role of information in consumer agreements looks at it from a costs/benefits analysis, i.e. the cost of producing it and the cost for consumers to access it and process it. It also looks at the gains that consumers can make from accessing the information and at the false perception that consumers may be lead to that the cost of information is too high, giving rise to a potential consumer protection problem: Hadfield, Howse & Trebilcock, *supra* note 25 at 141-145. Howells & Weatherill, *supra* note 4 at 65, posit the question by looking at the relatively low cost to provide information by suppliers in comparison to the broader actual benefit that it may have to produce more informed consumers.

⁶⁷ Efficiency in how consumers arrive at their decisions is one of the justifications for consumer protection in the European Union as stated in *Directive 2005/29/EC, supra* note 9, Preamble, Recital 14: “It is desirable that misleading commercial practices cover those practices, including misleading advertising, which by deceiving the consumer prevent him from making an informed and thus efficient choice.”

burden on consumers by privileging a certain conduct by valuing the supply and absorption of information, as opposed to a more passive role.⁶⁸

Although the obligation to disclose material information before consumers enter into a binding agreement and its justifications are rather uncontroversial⁶⁹ (as found in Canadian and in European consumer protection legislation),⁷⁰ other jurisdictions such as the US have attempted another approach with a proposal for uniform codification through the *Uniform Computer Information Transactions Act* [UCITA].⁷¹ Under UCITA, the “opportunity to review” terms as opposed to an obligation to supply terms before completing the transaction is justified by the nature of electronic transactions and to promote transaction “efficiency.”⁷² The shortcomings of absence of information are compensated by a limited cool-off period under which consumers can automatically cancel the transaction at will.⁷³ The approach proposed by UCITA has encountered fierce resistance, with the result that it has been enforced in two US states only.⁷⁴

A more thoughtful approach to the meaning of “efficiency” needs to favour a meeting of the minds that is as close as possible between what the supplier offers and what the consumer bargains for, as opposed to focusing solely on the speed of individual transactions and the costs saved by suppliers in pre-sale procedures and communications. The teachings of behavioral law and economics also suggest that the “opportunity to review” approach proposed by UCITA, as opposed to the obligation to supply information approach largely favours suppliers as it takes advantage of the inertia bias of consumers, including disgruntled ones.⁷⁵ Moreover, a legal design that does not promote the supply of information shapes consumers’ expectations through the distributors with which they interact. It

⁶⁸ Howells, *supra* note 58 at 364.

⁶⁹ Girot, *supra* note 14 at 66. For the potential pitfalls of consumer disclosure requirements, see Hadfield, Howse & Trebilcock, *supra* note 25 at 141-145; and Trebilcock, *supra* note 23 at 95.

⁷⁰ See Chapter 9 Part IV.

⁷¹ Official Text, *Uniform Computer Information Transactions Act* (2002), online: <http://www.law.upenn.edu/bll/archives/ulc/ucita/2002final.htm>. See the discussion on UCITA in Chapter 9 Part IV.

⁷² See the discussion on UCITA, *supra* note 71, in Chapter 9 Part IV. Proponents of this model include Epstein, “Contract not Regulation”, *supra* note 24.

⁷³ *Ibid.*

⁷⁴ See the discussion on UCITA, *supra* note 71 in Chapter 9 Part IV.

⁷⁵ Thaler & Sunstein, *supra* note 44 at 17ff. The authors describe how people are generally loss adverse and how this may lead to the “status quo bias.” Applied to the present case, “status quo bias” would make it less likely that consumers would return the purchased software after having found out of its unsatisfactory terms, hence the increased sales that this represents for distributors, as opposed to a scenario where important information would be disclosed before the sale occurs.

legitimizes impulse and recklessness rather than reinforcing the merit of reflection and awareness, and alleviates the detrimental effects of a passive approach to information gathering. At a normative level, providing material information to consumers prior to the transaction is the more reasonable approach. The inefficiencies and burdens that it may engender on the part of the supplier are largely compensated by the objectives that are promoted and by the overall efficiencies that can result there from.

Information disclosure requirements are the least intrusive of the consumer protection legal mechanisms examined in this chapter. They do not interfere with the merit of the terms of the transaction or with its reasonableness. While they may be seen as satisfactory on their own, from the perspective that entrusts market dynamics to resolve most consumer grievances on their own, they suffer from important shortcomings. The breach of information disclosure requirements gives rise to limited remedies.⁷⁶

While they play an important role in consumer transactions, one should guard against being too optimistic about the efficiency of information disclosure requirements to ensure that a bargain will meet consumers' reasonable expectations. There is a danger to overestimate consumers' ability to understand and process the information that is being provided and its efficacy to resolve the overall asymmetry that subsists between consumers and suppliers.⁷⁷ The distribution online of information products, including copies of copyright works, is often accompanied by lengthy standard non-

⁷⁶ See the discussion on information disclosure requirements in Chapter 9 Part IV A.

⁷⁷ Howells & Weatherill, *supra* note 4 at 25 and 64 point to the shortcomings of information disclosure requirements as they assume that consumers are able to absorb the relevant information and rely on "a smart and attentive consumer", while empirical evidence tends to illustrate the contrary. Niva Elkin-Koren, "A Public-Regarding Approach to Contracting over Copyrights", in Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First eds., *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001) at 201-202. L'Heureux *supra* note 5 at 17-18 takes the position that consumers' ability to read the information is somewhat irrelevant as it is unlikely that they would ever be in the position to understand all ramifications behind the transaction. Other factors that may temper the efficacy of information disclosure requirements are the lack of time and alternatives, market impediments to switching. Insights from behavioural economics explain consumers' limited ability to understand and process information because of their tendency to make "self-serving interpretations", "over or under optimism", focus on immediate pleasures rather than long term effects, and the fact that their preferences can be easily manipulated. These tendencies are discussed in Howells, *supra* note 58.

negotiated end-user agreements.⁷⁸ The industry of digital content is particularly prone to information overload, which defeats one of the initial purposes for supplying the information.⁷⁹

The case has not been made that consumers are generally more advantaged by lengthy information than they are in an environment that relies on the inherent efficiencies of transactions they are well familiar with, such as a sale, with no terms attached on what consumers can and cannot do with respect to the copy of the copyright work they recently acquired. On the contrary, the increased commercial practice to licence rather than sell the copy of the copyright work is a contract generally accompanied by lengthy non-negotiated standard terms and conditions that are still unclear for many consumers. Jean Braucher refers to the unfamiliarity of consumers with licence agreements as a “core information problem.”⁸⁰

While information disclosure requirements can provide helpful guidance to prudent copyright consumers, they are not likely to cure any systemic shortcomings in the scope of their permitted use. The likelihood of effective competition on the spectrum of permitted uses is uncertain, especially with those terms of use involving complex legal issues such as the ability to exercise fair dealing on the work.⁸¹ They are more likely to be relegated to pure legal considerations rather than attracting on either side the required attention that fuels competition dynamics. Information disclosure requirements are not sufficient. They need to be accompanied by legal mechanisms that regulate the substance and reasonableness of the transaction, such as prohibitions against unfair practices and the construction of implied obligations.⁸²

⁷⁸ See the discussion on non-negotiated standard end-user agreements applicable to commercial copies of copyright works in Chapter 3 Part III C.

⁷⁹ Loos & al., *supra* note 51 at 48.

⁸⁰ Jean Braucher, “12 Principles for Fair Commerce in Mass-Market Software and Other Digital Products” in *Consumer Protection in the Age of the “Information Economy”*, (Aldershot, UK: Ashgate Publishing Ltd., 2006) at 16.

⁸¹ See the discussion on non-negotiated standard end-user agreements applicable to commercial copies of copyright works in Chapter 3 Part III C.

⁸² Braucher, *supra* note 80 at 64 and 69; L’Heureux, *supra* note 5 at 17-18.

IV. The justifications for prohibition of unfair practices

The justifications for the prohibition of unfair practices and the legal remedies available when practices are held to be unfair⁸³ are also grounded in the need to address the detrimental effects of asymmetry for the consumer, with a particular focus on asymmetry in resources and in the ability to obtain adequate relief.⁸⁴ It aims at protecting consumers against abuse of power by sellers or suppliers with a particular focus on non-negotiated one sided standard term agreements.⁸⁵ It generally supports consumers' reasonable expectations that contracts in the market place ought to be fair.⁸⁶ The prohibition sends a strong public policy signal that certain practices will not be tolerated and that freedom of contract and autonomy may be overridden as a means to deter their use in commerce.⁸⁷

Prohibitions of unfair practices are not only designed to benefit consumers but also honest and fair traders who may also suffer from detrimental and abusive practices. Prohibitions against unfair practices have strong economic underpinnings to promote consumers' and sellers' confidence leading to thriving markets and to counter possible competitive trends leading to a race to the bottom.⁸⁸ From a behavioral economics perspective, even more specific unfair practice prohibitions become warranted in lieu of general prohibitions targeting unfair and unconscionable practices, when specific and widespread abuse is identified.⁸⁹ Ultimately, prohibitions against unfair practices are meant to redress the inherent conflict between, *inter alia* aggressive advertising and enticement campaigns and

⁸³ Contract clauses that are held to be unfair often entitle consumers to rescind the contract and "to any other remedy available at law": for example see *OCPA*, *supra* note 3, s 18.

⁸⁴ C.J. Miller, Brian W. Harvey & Deborah L. Parry, *Consumer and Trading Law* (Oxford: Oxford University Press, 1998) at 4.

⁸⁵ *Directive 93/13/EEC*, *supra* note 9, Preamble; Miller, Harvey & Parry, *supra* note 84.

⁸⁶ On the link between the legal interpretation tool of "reasonable expectation" and fairness, see Girot, *supra* note 14 at 33ff, who argues that contracting parties can reasonably expect that contracts they enter into are not to operate unfairly.

⁸⁷ L'Heureux, *supra* note 5 at 275.

⁸⁸ Particularly in a European Union context to facilitate harmonization and eliminate barriers to trade between member states: *Directive 93/13/EEC*, *supra* note 9. On the effects that poor quality products (lemons) can have in lowering the overall quality of products offered on the market, and on the effects (costs) of dishonest practices in taking honest traders out of a particular market, see : George K. Akerlof, "The market for "lemons": quality uncertainty and the market mechanism" (1970) 84 *The Quarterly Journal of Economics* 488, in particular at 495-496.

⁸⁹ Bar-Gill, "Seduction by Plastic", *supra* note 6 at 1415.

the reasonable expectations of consumers to be adequately informed and to expect honesty from merchants.⁹⁰

In Chapter 9, I discussed the scope and operation of prohibitions against unfair commercial practices and how they applied in cases involving commercial copies of copyright works.⁹¹ In particular, I explained how by their nature, they may be of more limited appeal for the purpose of confronting restrictions of uses of commercial copies of copyright works at a substantive level, provided that adequate disclosures of the restrictions are made.⁹² I also discussed how on that terrain, consumer implied obligations may be more attractive to consumers⁹³ because their application depends on a non-exhaustive list of factors (within and outside the terms of the agreement) which need to be considered to assess whether consumers' reasonable expectations of uses have been met. I will now turn to the justifications that withstand consumer implied obligations.

V. The justifications for implied obligations

A. Rectification of information asymmetry

Similarly to other consumer protection obligations, the most frequently invoked justification in support of implied obligations (e.g., implied obligations of quality, fitness for purpose, correspondence with description, title, quiet possession and freedom from encumbrances) is the information asymmetry that prevails between the seller and the buyer, and the gap that it can create between what consumers can reasonably expect and what they receive.⁹⁴ The justification of

⁹⁰ L'Heureux, *supra* note 5 at 306 discusses the inherent conflict between publicity aims and the need to inform consumers adequately. Consumers should be able to expect honesty from merchants, justifying state intervention.

⁹¹ See the discussion in Chapter 9 Part IV.

⁹² *Ibid.*

⁹³ At least with respect to a significant part of Canada's provincial and territorial jurisdictions and the EU, UK and France: see the discussion in Chapter 9 Part II.

⁹⁴ Christian Twigg-Flesner, *Consumer Product Guarantees* (Aldershot: Ashgate Publishing, 2003) at 7. This is, according to the author, the foundation of the three main implied quality warranties of English law: correspondence with description, satisfactory quality and fitness for a particular purpose, as well as of EC, Parliament and Council *Directive 1999/44/EC* of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJL 171/07 at 12 [*Directive 1999/44/EC*]; Howells & Weatherill, *supra* note 4 at 29-30 and at 146; L'Heureux, *supra* note 5 at 63. In economic theory terms this asymmetry can give rise to a market failure, a "consumer protection problem": i.e. when consumers are not getting

minimum standards underlying implied obligations is founded upon the greater knowledge and control that suppliers have or should have about or over the good or service, in contrast with the one of consumers.⁹⁵ The corollary of information asymmetry being the main justification of implied obligations is that once a specific feature or defect of the product is specifically brought to the attention of consumers, suppliers are relieved of their implied obligations with respect to the object that was specifically disclosed.⁹⁶ This is the exception regime applicable to defects being disclosed in most consumer statutory implied obligations.⁹⁷ Here, the aim is to encourage transparency and fairness in commercial transactions, while preserving consumers' freedom of choice.⁹⁸

Information asymmetry cannot be the sole justification to support the existence of consumer implied obligations especially when they are mandatory. Courts have not hesitated to construe implied obligations setting minimum standards of quality, fitness for purpose or quiet possession, regardless of information provided by the supplier to the contrary.⁹⁹ In consumer contracts, the written terms of the agreement are tempered by other factors that courts consider to assess consumers' reasonable expectations with respect to quality or fitness for purpose.¹⁰⁰ Information asymmetry cannot therefore, on its own, fully justify how implied obligations are construed in the agreement between suppliers and

what they intended to buy, where information costs are relatively high or value of information perceived to be low: Trebilcock, *supra* note 23 at 70.

⁹⁵ This is the case with respect to warranties against latent defects which are often assimilated to warranties of quality and of durability: see the discussion in Chapter 9 Part II A.; *ABB Inc. v Domtar Inc.* (2007) 3 RCS 461 (SCC) at paragraph 41; Ontario Law Reform Commission, *Report on Sale of Good*, (1979) [OLRC Report on Sale], at 207; see also Howells, & Weatherill, *supra* note 4 at 29-30 and at 146; L'Heureux, *supra* note 5 at 63.

⁹⁶ This is how Twigg-Flesner, *supra* note 94 at 11, summarizes the effects of the application *Directive 1999/44/EC*, *supra* note 94: "statutory rights of consumers only operate to the extent that the consumer was completely unaware of the standard of quality of a particular product. Once the consumer is made aware of that shortcoming, he cannot complain about this subsequently. The Directive therefore creates a basic quality standard, but this can be displaced by disclosing to the consumer any quality defects that exist."

⁹⁷ The disclosure of the defect is one of the most important exceptions to the application of implied obligations of acceptable or merchantable quality, as discussed in Chapter 9 Part II A. This is also central to the operation of warranties of quality and against latent defects in the *Civil Code of Québec*, art 1726-1731CCQ. A similar regime applies in Europe to limit the effect of implied terms: *Directive 1999/44/EC*, *supra* note 94, art 14(2C) where matter "which would usually render a product unsatisfactory is specifically drawn to the consumer's attention before he buys the product, or where the consumer examines the product before purchase and where this examination should have revealed the defect."

⁹⁸ This would include the opportunity to negotiate (obtain) the product at a lower price as a result of the defect. I discuss the application of the exception of defects specifically brought to the attention of consumers to standard terms and conditions setting the scope of use of copies of copyright works is discussed in Chapter 11 Part I.

⁹⁹ See the discussion in Chapter 9 Part II A. For example, courts' reluctance to give any effect to contract clauses stating that the good is sold "as is."

consumers, regardless of sometimes contradictory information being provided. Information asymmetry raises broader concerns that are not curable alone by supplying the information to consumers. The assumption that this imbalance and other asymmetries¹⁰¹ are always present to some extent raises issues of fairness that the construction of implied obligations seeks to preserve.¹⁰²

An instrumental economic approach to consumer protection also promotes fairness¹⁰³, which is likely to create more confidence in the market place,¹⁰⁴ an essential component of thriving markets.¹⁰⁵ Implied obligations with respect to quality and fitness for purpose can lead to greater efficiencies by discouraging the production of goods and services that are below consumers' reasonable expectations, to reduce instances of market failures.¹⁰⁶ On the premise that suppliers are in a privileged position with respect to the products they sell,¹⁰⁷ they should bear the burden of products falling below these standards, which can be spread across production costs.¹⁰⁸

¹⁰⁰ See the discussion in Chapter 9 Part II A.

¹⁰¹ This includes the asymmetry of bargaining power between suppliers and consumers. The lack of bargaining power includes the lack of means to have consumers' aspirations taken into account regarding available products: Girot, *supra* note 14 at 72, invokes this lack of power as one of the justifications for setting minimum standards through implying terms of quality in consumer agreements. It is also a justification for provisions under which any ambiguity is to benefit the consumer: *OCPA*, *supra* note 3, s. 11; *QCPA*, *supra* note 4, s. 17, and in the fact that certain consumer rights and remedies under consumer legislation cannot be contracted out: *OCPA*, *supra* note 3, s. 9(3); *QCPA*, *supra* note 4, s. 261 and 262. See also Howells & Weatherill, *supra* note 4 at 6.

¹⁰² Fairness is one justification invoked for construing implied obligations in contracts: Stephen M. Waddams, *The Law of Contracts*, 5th ed (Toronto: Canada Law Book, 2005) at para 146.

¹⁰³ *Directive 1999/44/EC*, *supra* note 94, Preamble, Recital 2; EC, *The Green Paper on the Review of the Consumer Acquis* (Brussels, EC, 2006) [Green Paper on Consumer Acquis] at 17, proposed the introduction of general good faith and fair dealing provisions. EC, *Proposal for a Directive of the European Parliament and of the Council on consumer rights* (Brussels, EC, 2008), refers to the principle of good faith in assessing the fairness of contract terms.

¹⁰⁴ Green Paper on the Consumer Acquis, *supra* note 103 at 4,7.

¹⁰⁵ *Directive 1999/44/EC*, *supra* note 94, Preamble, Recital 2, 4. Howells & Weatherill, *supra* note 4 at 48 describe the critical role of consumers in efficient competitive markets: "Consumers benefit from competitive markets, but they generate them too. Policy is therefore sensibly directed at improving consumer information and education, so that people are able to perform the role as demanding consumers which is a pre-condition to efficiently functioning markets."

¹⁰⁶ For the analysis of the benefits and limitations of warranties on goods and services as effectively setting minimum standards of quality, durability, etc... see Howells & Weatherill, *supra* note 4 at 145-212 (chapter "Quality of goods and services"). In contrast to the requirement of the safety of goods, around which there is more unanimity justifying legal standards and even state intervention, the question of whether any general standard should apply to the quality of goods is a more controversial proposition. The authors argue that a minimum standard of quality is desirable in the modern economy while recognizing the need to allow flexibility in the meaning of the term to allow for various markets.

¹⁰⁷ I.e., by generally benefiting from information, bargaining power, ability to influence the market of given products (design, terms of sale, applicable rules, etc...).

¹⁰⁸ OLRC Report on Sale, *supra* note 95 at 207; L'Heureux, *supra* note 5 at 63.

If the rectification of information and other asymmetries cannot account fully for the underlying justifications of (mandatory) implied obligations, what other rationale provides a more cogent explanation to their existence? This is what I explore next.

B. Property theory

A less explored justification of implied obligations in consumer protection literature is based on property theory. The need to imply obligations may be necessary to reconcile the effects of contracts with concepts of property and ownership as a fundamental institution regulating human interactions and allocating resources since times immemorial.¹⁰⁹

Through the lens of property, the justification for implying terms arises from the need to fill the gap between consumers' reasonable expectations based on their ownership or possessory rights in a resource, and the effects of the consumer transaction. This view looks at implied obligations beyond the contract terms that they constrain and under which copies of copyright works are made available to consumers. It looks at the broader implications of statutory implied obligations as they directly interface with property, e.g., how they can heavily rely on, support and/or shape the ownership or possessory rights that consumers acquire in the copy of the copyright work, as well as the property rights of copyright holders in the copyright work.

Contract terms and the implied obligations construed into them do not operate in a vacuum, nor do they only involve two parties. They exist within a complex web of relationships, laws and regulations, including property law. If anything, warranties of quiet possession and of quality or fitness for purpose are the confirmation and protection of core attributes of ownership, e.g., *prima facie* open-ended powers and privileges to the enjoyment of the owned good.¹¹⁰ Statutory implied obligations of quality and fitness and of quiet possession apply in contracts for the sale of goods or the provision of services. In the former case, this involves the transfer of ownership or possession to the copy of the copyright work. Through that lens, property law and concepts of ownership, become highly relevant

¹⁰⁹ James W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996) at 4.

¹¹⁰ *Ibid*, at 5.

in determining the scope of implied obligations, including through the assessment of consumers' reasonable expectations.¹¹¹

A property perspective of consumer implied obligations will not in and of itself cure all deficiencies and obstacles raised in the previous chapters, as I applied property and copyright law to articulate consumers' rights in copies of copyright work. This is particularly the case in the context of the expanding property rights of copyright holders,¹¹² with the possibility to extend these rights further through contract. It also needs to be situated within the constraints of the application of consumer law to commercial copies of copyright works that I discussed in Chapter 8 and Chapter 9. However, it can provide a framework of analysis from which safeguards can be developed, to ensure the application of basic concepts of property and ownership, when these were unjustly altered by contract to the detriment of consumers, or when the contract was silent or unclear on those terms. Thus, statutory implied obligations provide additional support to clarify ownership rights in copies of copyright works as they mediate between the consumers' expectations in their ownership or possession sphere, and how it can be altered in the contract sphere. There are specific scenarios under which consumer statutory implied obligations are more likely to support and clarify copy ownership than in others, as I will explore in Chapter 11.¹¹³ With this property framework in mind, I will now turn to the potential and limitations of statutory implied obligations.

C. Potential and limitations of statutory implied obligations

A criticism of (mandatory) statutory implied obligations is that they set minimum standards (e.g., with respect to quality and fitness for purpose) that have the potential of narrowing the freedom of choice of consumers to specific levels of quality or purposes.¹¹⁴ The fear is that mandatory levels of quality and fitness for purpose can lead to a standardization of market offerings to the detriment of consumers who face a lesser range of quality or panoply of functionalities and uses. This concern is particularly

¹¹¹ Consumers' reasonable expectations is the test to determine the application of statutory implied obligations in Saskatchewan, New Brunswick, Québec and the United Kingdom: see the discussion on implied obligations of quality and fitness for purpose in Chapter 9 Part II A.

¹¹² I discuss the progressive expansion of copyright holders' exclusive rights in Chapter 5 Part II. For a discussion on the introduction of technological protection measures to protect copyright holders' exclusive rights further, see the discussion in Chapter 3 Part III B.

¹¹³ See Chapter 11.

¹¹⁴ Rott, *supra* note 39 at 452, characterizes mandatory rules in sales law as follows: they "set limits to party autonomy, in safeguarding a minimum quality of the product that cannot be abrogated by contract."

relevant with respect to the commercialisation of copies of copyright works for which the variety of offerings on how consumers experience copyright works prevails.¹¹⁵ This view implies that unhindered market forces will address consumers' needs to have access to a broad range of choices.

A closer look at the operation of consumer statutory implied obligations shows that they are not irreconcilable with freedom of choice, because they embed flexibility through the factors that need to be taken into account when deciding whether there existed an implied obligation and whether it was breached.¹¹⁶ Among those, price is an important factor that ensures that a differentiation in the quality and variation in the functionalities offered is maintained.¹¹⁷ The reason is that implied obligations revolve around the promotion of commercial practices to ensure consumers' reasonable expectations are met, which vary on a case-by-case basis. At the same time, it also implies that in some cases, the implied obligations step in to protect consumers against events that they cannot foresee at the time of the commercial transaction but that nevertheless form part of what those reasonable expectations should be. The implied obligation of quiet possession is one example whereby without specifically articulating it or being aware of it when they enter into a contract to purchase a good, consumers reasonably expect that they will have the quiet enjoyment of the commercial copy, free of encumbrances and hindrances once they own it.

In the particular case of permitted uses of copies of copyright works, the criticism that statutory implied obligations could interfere in a way that would narrow the freedom of choice of consumers may rely on an overly optimistic view of the breadth of choices and influence power that consumers actually have,¹¹⁸ given the asymmetry in bargaining power and information that is characteristic of

¹¹⁵ See Chapter 1 Part I.

¹¹⁶ See the discussion on the various factors to be taken into account to determine the applicability of implied obligations of quality and fitness for purpose in Chapter 9 Part II A. See also Howells & Weatherill, *supra* note 4 & *supra* note 106; Twigg-Fleschner, *supra* note 94 at 7.

¹¹⁷ See the discussion on the various factors to be taken into account to determine the applicability of implied obligations of quality and fitness for purpose in Chapter 9 Part II A.

¹¹⁸ For example, the view of the empowered consumer is reflected in the consultation paper: Office of Fair Trading, Consumer Affairs Strategy – A consultation paper, (1996), online:

http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft166.doc, at 11, Section 6 “Guiding Principles” at paragraph 6.1: “We believe that the interests of consumers are best served by a marketplace in which they are able to exercise genuine choice. It is essential, therefore, that our work should promote consumers’ confidence, and thus their ability to spend effectively and efficiently. This will not only help consumers to help themselves, but should in its turn lead to more effective and efficient production, and growth in the economy as a whole. Consumers are, generally, the best judges of their own interests, and it is therefore for them to make their own choice based on those interests and according to their own values.

consumer transactions. Their “freedom of choice” in an increasingly non-negotiated standard terms environment, and more particularly with respect to the legal terms attached to the scope of permitted uses for copies of copyright works supplied online, such as e-books, musical recordings or films, may be more limited than it would appear at first.¹¹⁹ In that particular sphere, the freedom of choice may boil down to completing the consumer transaction or walking away.

The need to preserve consumers’ autonomy and freedom of choice needs to be invoked in the proper context.¹²⁰ If the argument is made without any qualification, as a means to condemn any laws that affect the substantive terms of private transactions, it can have the contrary effect and limit consumers’ autonomy and freedom of choice. While price can act as an important differentiator in ensuring a variety of quality levels and functionalities in the market place, there are fundamental elements of a transaction that should not even be part of the in or out equation in the first place. This can include restrictions that suppliers impose on goods that offend the most basic expectations of ownership: *prima facie* open-ended quiet possession and enjoyment, free from encumbrances with the freedom to transfer. It can also include restrictions that for instance copyright holders would impose in the name of their rights in copyright works but that go against the overall objectives of copyright law. One of the precepts of consumer law is that there are certain rights that can simply not be sold.¹²¹ I explore in Chapter 11 whether any of consumers’ rights in copies of copyright works (should) fall in

While direct intervention may be necessary when things go wrong, the main emphasis of consumer affairs work should be to empower consumers to look after themselves.”

¹¹⁹ See the discussion on non-negotiated standard end-user agreements of commercial copies of copyright works purchased online in Chapter 3 Part III C.

¹²⁰ Natali Helberger and P. Bernt Hugenholtz, “No place like home for making a copy, private copying in European copyright law and consumer law” (2007) 22 Berkeley Tech. L.J. 1061 at 1095, summarize this dilemma in the context of the private copying regime in European copyright law as the need to adopt a balanced and cautious approach, i.e. that the interests of consumers to clarity and certainty and a reasonable scope of use of copyright materials needs to be balanced with consumers’ interest to choice (i.e., more limited rights to use at a cheaper price) and the overall economics, societal and also copyright objective to promote innovation in the variety and marketing of copyright products.

¹²¹ This principle is reflected in consumer protection clauses under which implied obligations cannot be overridden by contract, as discussed in Chapter 9 Part II A. This is also reflected by the treatment of arbitration clauses, the effect of which is constrained in some consumer protection laws, to the extent that they limits consumers’ ability to take legal action before courts of law to ascertain their claim. The treatment by consumer protection law of arbitration clauses was reviewed by the Supreme Court in *Dell Computer Corp. v Union des consommateurs*, 2007 SCC 34 and in *Seidel v TELUS Communications Inc.*, 2011 SCC 15. See also Rott, *supra* note 39 at 455: “...it must be prevented that online content providers circumvent consumer law by simply naming something a “new business model,” or a service where it is truly a sale. The benchmark should be whether or not different needs of consumers are satisfied. What is not sufficient is simply to give the alternatives of “more rights—higher price” and “less rights—lower price” since the very idea of mandatory rights is to prevent consumers from “selling” their rights.”

that category through various applications of copyright holders' exclusive rights.¹²² Starting with the reasonable expectations that should come with ownership of commercial copies as a base of reference for the application of implied obligations the role of which is to support such reasonable expectations may reduce the chances of making a highly deceiving transaction, leading to greater consumer confidence in the market place. The reference point of the *prima facie* open-ended privileges and powers of ownership in commercial copies offers the vehicle to promote important values such as innovation, the dissemination and access to information and culture for the benefit of copyright consumers.¹²³

Consumer statutory implied obligations are typically interpreted on the basis of "internal factors" as expressed by the contract (e.g., the terms of the agreement including the price and express warranties, their validity, the effectiveness and applicability of notification provisions) and "external factors" to the contract (e.g., advertisement, representations of the supplier made outside the contract,¹²⁴ verbal agreements, descriptions of the product, custom and usage). Jurisdictions that explicitly ground the application of implied obligations on "consumers' reasonable expectations" typically list a non-exhaustive list of factors to be considered to make the proper determination.¹²⁵ In the other jurisdictions importing "merchantable quality" and "fitness for a particular purpose" tests from sale of goods law, the standards they set are less expressly lenient towards consumers' reasonable expectations.¹²⁶

The ability that suppliers have to influence relevant industry factors is a broader manifestation of the various asymmetries subsisting in consumer transactions. The extent to which the application of implied obligations, more particularly of quality and fitness for purpose can succeed at alleviating these imbalances relies in part on the factors considered to determine what is "satisfactory," "acceptable," or "merchantable" quality. More specifically, it depends on the extent to which those factors are within the control of suppliers or not. On the one hand, the price, the description of the product, and other representations made by the supplier are factors that are within suppliers' control

¹²² See the discussion in Chapter 11.

¹²³ I discuss the theoretical justifications of the property rights in copies of copyright works in Chapter 6 Part III.

¹²⁴ *QCPA*, *supra* note 4, s. 263; *Directive 1999/44/EC*, *supra* note 94, art 2 (2), 2 (3).

¹²⁵ This is the case in Saskatchewan, New Brunswick and in the United Kingdom: see the discussion on implied obligations of quality and fitness for purpose in Chapter 9 Part II A.

¹²⁶ See the discussion on implied obligations of quality and fitness for purpose in Chapter 9 Part II A.

and specifically listed in provisions based on consumers' reasonable expectations on "acceptable" or "satisfactory" quality.¹²⁷ On the other hand, factors such as "all the purposes for which goods of the type are commonly supplied,"¹²⁸ as well as the non-exhaustiveness of factors to be considered,¹²⁹ allow courts to normalize the transaction by taking into account circumstances that are outside suppliers' control. From that standpoint, they have the potential to alleviate the detrimental effects of the asymmetries that subsist in consumer transactions. In the context of copies of copyright works, other relevant factors to assess consumers' reasonable expectations can include: consumer habits, relevant surrounding products and technologies having an effect on usage and, other parties' rights,¹³⁰ e.g., the exclusive rights of copyright holders. These sets of conditions may vary in time and in space. This enables the mechanism of statutory implied obligations to easily adapt to new markets, legal and technological environments.

The efficacy of statutory implied obligations to guide and shape market behaviour toward acceptable standards has been put in question.¹³¹ More specific to copies of copyright works, their aptitude to

¹²⁷ See Saskatchewan *Consumer Protection Act*, 1996 c C-30.1 [SCPA], ss 48(d), 39(a); UK *Sale of Goods Act* 1979 (U.K.), 1979, c. 54 [UKSGA], s 14(2).

¹²⁸ UKSGA, *supra* note 127, s 14(2).

¹²⁹ *Ibid*; SCPA, *supra* note 127, ss 48(d), 39(a).

¹³⁰ See the report prepared by the Center for Democracy & Technology, *Evaluating DRM: Building a Marketplace for the Convergent World* (2006), online: <http://www.cdt.org/copyright/20060907drm.pdf>., at 14; see also Pamela Samuelson & Jason Schultz, "Should copyright owners have to give notice of their use of technical protection measures?" (2007) 6 J. Telecomm. & High Tech. L. 41, at 44-45, where the authors describe how consumers' expectations are increasing with new technologies: "It is thus not surprising that consumers expect to be able to time-, place-, space-, and platform-shift as to digital media products, as well as to make backup copies. [citations omitted] Because digital technologies enable new flexibilities in ways to use and consume digital information, consumers have come to expect to be able to do more with digital media products than they could do with analog media products.[citations omitted] Consumers may, for example, expect to be able to link works together, format-shift, annotate them, tinker with them, remix and mashup existing digital content, and share their new creations with others." [citations omitted]

¹³¹ Hugh Collins, *Regulating contracts* (Oxford: Oxford University Press, 1999) At 293, discusses the efficacy of implied warranties or conditions as a means to guide market behaviour: "The general standard of "satisfactory quality" becomes particularized to an individual case during trial. It is always arguable that another case on slightly different facts should receive a different treatment. The standard now becomes so detailed in its application that it still cannot serve as a guide to market behaviour. This argument may exaggerate this weakness of private law regulation of quality standards, for it is possible to obtain guidance by reasoning by analogy from decided cases. Nevertheless, it is true that private law regulation provides indeterminate guidance in borderline cases. For example, the law may clarify the point that the durability of goods is an aspect of satisfactory quality, but it remains for the courts in isolated and un-publicized decisions to specify what this requirement may mean in practice. Does it mean, for instance, that the goods should remain in working order for a reasonable time after purchase?"; see also Twigg-Flesher, *supra* note 94 at 19.

adequately promote and protect the interests of copyright consumers is uncertain.¹³² The factors to the contract that courts generally consider to determine the applicability of statutory warranties or implied obligations, are shaped to a large extent by, and are within the control of the supplier, not the consumer. The reasonable expectation of the consumer remains largely influenced by the supplier, through how they offer their product(s) including the standard contract terms under which they can be purchased (or licensed).

The report on consumer protection in relation to digital content¹³³ which looks at the laws of 11 jurisdictions (European states, and the US) notes how the suppliers' ability to shape consumers' reasonable expectations is more acute in areas where the industry conformity standards are less established, such as in the case of digital content.¹³⁴ In this context, rules of conformity, e.g., that the goods are of satisfactory quality and fit for their purpose may be of little assistance to consumers.¹³⁵ The information provided by suppliers can take a disproportionate place in assessing consumers' reasonable expectations compared to other factors such as the legal framework (including copyright laws) and other surrounding circumstances under which the digital content is provided. The report therefore recommends legislative reform that would clarify that in the case of digital content contracts, statements made by suppliers can limit consumers' reasonable expectations only in so far as reasonable in the circumstances.¹³⁶

The legitimacy of consumers' expectations with respect to copies of copyright works can be established by looking at how the consumer transaction is aligned with the legal framework' objectives in which it takes place. For example, consumers' expectations of uses of copyright works for personal uses can be legitimized by copyright's exceptions to infringement or users' rights or more generally, copyright's instrumental design to favour the creation of works and their dissemination to the public.¹³⁷ They can also be legitimized by the expectations they have as owners of copies within property law. When the effects of consumer transactions create obstacles that go against consumers'

¹³² Lucie Guibault & Natali Helberger, "Copyright law and Consumer Protection, Study carried out for the European Consumer Law Group" (2005) ECLG/035/05; Niva Elkin-Koren, "Making Room for Consumers Under the DMCA" (2007) 22 Berkley Technology Law Journal, 1119 at 1130- 1131; Helberger & Hugenholtz, *supra* note 120. See also Mc Gowan, *supra* note 35.

¹³³ Loos & al., *supra* note 51.

¹³⁴ *Ibid* at 222ff.

¹³⁵ *Ibid*.

¹³⁶ *Ibid*.

¹³⁷ I discuss the theoretical justifications of copyright in Chapter 6 Part III.

legitimate expectations as evidenced by their misalignment to their legal framework and objectives, the consumer protection legal mechanisms explored here have the potential, through rippling effect, of addressing deceit beyond the consumer's personal experience, and rectifying systemic imbalances created by the targeted commercial practice for the benefit of all consumers.¹³⁸

The malleability of consumers' expectations through copyright holders' ability to set the agenda in how they make commercial copies available is particularly relevant in the context of copies of copyright works as "cultural artefacts."¹³⁹ Consumers' vulnerabilities in areas of education, culture, and freedom of expression should alert policy makers even more than with respect to other areas of consumption. In the case of copy ownership of copyright works, this imbalance in favour of suppliers is compounded by the application of the copyright holders' centric legal regime of copyright law in shaping consumers' reasonable expectations through the will and actions of copyright holders.¹⁴⁰ If as a result, consumers' reasonable expectations and the scope of statutory/implied obligations are indeed largely tributary of suppliers' (e.g., copyright holders) will and power, then there is nothing that statutory/implied obligations can add to our attempts so far to substantiate the ownership rights in the copy of a copyright work through property theory, within a predominantly copyright-holder-centric regime.

The French cases *Warner Music*¹⁴¹ and *Mulholland Drive*¹⁴² illustrate the effects of copyright holders' power on the applicability of consumer protection obligations. In these two cases, French courts were swift at setting aside consumer protection arguments to preserve the consumers' ability to make

¹³⁸ See Bourgoignie, *supra* note 27 at 299, who notes that the damage suffered by a deceitful practice of suppliers is rarely suffered by the consumer complainant alone but potentially all consumers who have come in contact with that practice.

¹³⁹ Elkin-Koren, *supra* note 132 at 1145.

¹⁴⁰ Helberger and Hugenholtz, *supra* note 120 at 1096-1097. The authors argue that the shortcomings on the applicability of consumer law principles lie on the author centric view of European copyright laws, which makes any claim for greater consumer considerations an "uphill battle."

¹⁴¹ Trib. gr. inst. 5^e Paris, 10 January 2006, *Christophe R., UFC Que Choisir / Warner Music France, Fnac*, (2006) JurisData: 2006-292685 [*Warner Music*] reversed on appeal: Court of Appeal 4^e A, Paris, 20 June 2007, *Fnac Paris / UFC Que Choisir et autres*, online: <http://www.legalis.net/jurisprudence-decision>; confirmed by Cour de cassation, civ. 1^{ère}, 27 Novembre 2008, *UFC Que Choisir / Fnac, Warner music France*, online: <http://www.legalis.net/jurisprudence-decision>. I discuss the implications of this case in Chapter 9 and in Chapter 11.

¹⁴² Cour de cassation, civ. 1^{ère}, 28 February 2006, overruling *Studio Canal et al. v S. Perquin and Union federale des consommateurs Que choisir*, Paris Court of Appeal, 22 April 2005, available at <http://www.juriscom.net/documents/caparis20050422.pdf>. [*Mulholland Drive*]. I discuss the implications of this case in Chapter 9 and in Chapter 11.

private copies of lawfully purchased copies of copyright works, in favour of the exclusive rights of the copyright holders.¹⁴³ To be sure, copyright law currently allows copyright holders to expand their exclusive rights by contract beyond their copyright statutory rights (which is particularly problematic with respect to consumer non-negotiated transactions). Further, copyright holder commercial practices increasingly involve the removal of any ownership rights of consumers in copies of copyright works. From that perspective, the inability of statutory implied obligations to intervene in favour of consumers becomes a further illustration and application of the imbalances between copyright holders and consumers.

The statement by the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*¹⁴⁴ that exceptions to copyright infringement are users' rights offers a promising outlook on the role that implied obligations can play within a consumer protection law framework in defining and delineating the scope of such rights. The go-between function that they can exercise to fill the gap between consumers' reasonable expectations as owners or possessors, and what they are receiving through the consumer transaction, can enhance consumers' grounds in a manner that has been little explored so far, with respect to copies of copyright works, as well as with respect to other goods.

VI. Conclusion

The most frequently invoked justification to protect consumers through, e.g., implied obligations (of quality and fitness for purpose, of correspondence with description, of title, quiet possession and freedom from encumbrances), prohibition of unfair practices and information disclosure requirements, is the need to address the detrimental effects of various asymmetries between the consumer and the seller. These rectifying tools are meant to ensure that consumers' reasonable expectations are met and among those, the expectation of fairness, for their benefit and the one of all market participants.

The justifications of intervention to protect consumers give rise to ideological debates that revolve around the role of the state in the regulation of private transactions and interfering with the market place.¹⁴⁵ State intervention and thriving markets are not mutually exclusive and the former may be required to strengthen consumers' confidence in the market place by incenting fair commercial

¹⁴³ *Ibid.*

¹⁴⁴ 2004 SCC 13.

practices for the benefit of all market participants. In the case of copies of copyright works, state intervention is also justified to ensure that consumer transactions are aligned and consistent with the relevant legal framework within which they subsist and their objectives, for instance property and copyright law.

Various levels of asymmetry are likely to be more present for consumers accessing (digital) copies of copyright works because (i) copyright law tends to be copyright-holder-centric though its primary purpose of defining copyright holders' exclusive rights with percolating effects in the application of other fields of the law (ii) copyright law which regulates to a large extent what consumers can and cannot do with their copies is complex and largely misunderstood (iii) there is widespread use of non-negotiated standard terms and conditions imposing licence terms that not only limit consumers' rights to use, but fundamental ownership rights such as transfer in the ownership of the copy that are not present in physical copies of copyright works exchanged from hand to hand (i.e., books, CDs, DVDs) (iv) the application of sale of goods and consumer protection laws to digital copies of copyright works still give rise to many areas of uncertainty. These factors alone raise a red flag that calls for more attention regarding the regulation of digital content.

The rectification of information and other asymmetries cannot alone explain the *raison d'être* of consumer obligations and in particular, consumer implied obligations (of quality, fitness for purpose, correspondence with description, title and quiet possession). I argued that the main underlying justification of consumer implied obligations is to protect consumers' reasonable expectations flowing from their ownership of the goods they purchased, to counter any distortion resulting from the manner by which the goods are supplied to consumers.

Justifying statutory implied obligations through their function in filling the blanks to meet consumers' reasonable expectations as owners of goods provides two important insights. First, the reconnaissance of the property rights, e.g., in commercial copies of copyright works is the condition *sine qua non* to the relevance and application of the statutory implied obligations. Without a firm understanding of the nature of commercial copies of copyright works as goods, copyright holders have the leisure to temper at will with what they offer to consumers and with it the possibility to remove the application of statutory implied obligations. In essence, statutory implied obligations cannot play their role of

¹⁴⁵ See the discussion in Part II of this chapter.

rectifying commercial transactions to meet consumers' reasonable expectations without the clearer recognition of their ownership rights in commercial copies and its significance.

Second, the centrality of property and ownership in how implied obligations operate precipitates the need to revise the scope of application of statutory implied obligations beyond goods to also cover services or mixed transactions, with the necessary adaptations.¹⁴⁶ As consumers increasingly experience copyright works through services without necessarily owning a copy, their reasonable expectations with respect to, e.g., the quality and fitness for purpose of the services need to be adequately taken into account.

The review of various scenarios on how the consumer protection obligations presented here can enhance (or not) consumers' ability to assert their rights to copies of copyright works is examined next. It is one mean to test this hypothesis and the beginning of an answer to the research question of this chapter on the extent to which consumer protection law can support consumers in ascertaining their rights to copies of copyright works.

¹⁴⁶ See the discussion in Chapter 8 Part II B, where I argued that the traditional justifications for regulating goods differently than services in consumer implied obligations are questionable in the context of mass standardized services (as opposed to craftsmanship type of services).

Chapter 11

Restrictions of Uses of Copyright Works as a Breach of Consumer Law Obligations

I. Introduction

In this chapter, I apply consumer law obligations to four scenarios involving use restrictions on commercial copies of copyright works. Threading through the uncertainties of the nature and scope of copyright users' rights that I discussed in Chapter 3, and the application of consumer law to commercial copies of copyright works in Chapters 8 and 9, I test the efficacy of consumer law as a property-limitation rule¹ on copyright holders' exclusive rights, more specifically, how it can support consumers' claims against copyright usage restrictions.

To what extent can consumer law intervene at the contractual level to cure the uncertainties and deficiencies identified with respect to copyright consumers' and copyright holders' rights at the property level?² How can it support claims to strengthen copyright consumers' rights against the manner by which copyright holders commercially exploit their exclusive rights? While Canada's Copyright Act [CCA]³ allows the courts to grant a broad range of remedies to copyright holders against copyright infringement,⁴ and provides defences to counter any allegation of copyright infringement,⁵ it does not provide any remedies to consumers. Consumers' claims are generally based on breach of contract and, potentially, as I explore here, on statutory consumer protection laws.

The starting proposition is that copyright holders' restrictions on uses of commercial copies of copyright works potentially breach consumer implied obligations, information disclosure requirements, and may give rise to unfair commercial practices on the basis of the privileged relationship that they enter into with consumers. As consumers are more empowered than ever before

¹ I.e. "when prima facie normative claims founded on the prevailing ownership conception are overridden. They are premised on the notion that but for the limitation they contain, the owner would be free to do as he pleases": James W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996) at 34.

² I refer here more specifically to the discussion on the nature and scope of exceptions to copyright infringement in Chapter 3 and on the application of property law and theory to mediate between the competing rights of consumers and copyright holders in the works in chapter 7.

³ RSC 1985, c. C-42.

⁴ CCA, *supra* note 3, s 34ff. Copyright infringement can also give rise to criminal sanctions: ss 42-43.

⁵ CCA, *supra* note 3, ss 29-32.2.

as to how they experience copyright works in a multitude of ways,⁶ they may receive conflicting signals between those uses that they can reasonably expect to perform with copyright works and what copyright holders allow them to do.

The four scenarios that I analyze here on the possible application of statutory consumer law to commercial copies of copyright works situate the contemplated uses within or outside the exclusive domain of copyright holders and within the reserved uses, based on a contractual authorization of use by copyright holders (or absence thereof) or on uses that are specifically authorized by the *CCA*. For each scenario, I apply the relevant statutory provisions of consumer protection obligations examined so far, as well as related case law dealing with a broad range of goods or services.⁷ The approach that I adopt here emphasizes the duality of two competing sets of ownership rights that subsist within copies of copyright works. Consistent with the property theory framework developed in the Second Part of my thesis to characterize the nature of copyright and of commercial copies of copyright works, I apply consumer protection law obligations and distinguish between obligations that derive from the exclusive property rights of copyright holders and the contractual obligations that are outside the scope of their exclusive property rights. Through this exercise I seek to emphasize the unique dynamics that are at play with respect to commercial copies of copyright works and what distinguishes them from other goods, our point of departure within a consumer law analysis.

In Part II, I apply statutory consumer law obligations to contemplated uses of copies of copyright works that are restricted and that fall within the exclusive rights of copyright holders.⁸ In Part III, I apply statutory consumer law obligations to contemplated uses that go beyond the exclusive acts that copyright holders partially authorize. In Part IV, I look at uses that fall within the exclusive realm of copyright holders' exclusive rights and are specifically authorized by copyright law,⁹ but are limited by the contract through which the copies are made accessible or through technological protection measures [TPMs]. In Part V, I look at contemplated uses that are outside the realm of the exclusive

⁶ See the discussion in Chapter 1 Part I.

⁷ See the discussion in Chapter 9.

⁸ Such as the exclusive right to produce or reproduce the work or to communicate the work to the public.

⁹ For example, an act which constitutes a fair dealing of the work under *CCA*, *supra* note 3, s 29.1 or that is permitted under the private copying regime: ss 79 - 88.

rights of copyright holders¹⁰ but are limited by contract or TPMs. In Part VI, I comment on the distinction between goods and services and how it impacts on the application of the consumer law obligations discussed in this chapter. I conclude in Part VII by situating the complementary role of consumer law vis-à-vis copyright law to help assert consumers' claims against restrictive terms on uses of commercial copies of copyright works. Consumer law's ability to play a remedial function is highly dependent on the allocation of rights, powers, and privileges that are set out in the *CCA*.

In each of the four scenarios examined here, I contemplate the terms under which the commercial copies are made available, i.e., with no or unclear terms, for example, upon the purchase of a music CD,¹¹ or with explicit standard terms and conditions of use, for example, upon the download of a musical recording or e-book.¹² I also discuss the implications of the presence of TPMs. All contemplated usages are for the personal use of consumers.¹³

II. Uses that fall within the exclusive rights of copyright holders

The scenario explored here contemplates by far the broadest scope of restrictions of use that are of interest in ascertaining consumers' rights to commercial copies of copyright works. The restrictions at stake are within the sphere of the exclusive property rights of copyright holders: the prohibition on making copies of the copyright work, on communicating the work to the public, on creating a derivative work from the copyright work, on performing the work in public, and the exclusive right newly introduced in the *CCA* to sell or transfer ownership of the work that is in the form of a tangible object.¹⁴ Here, the contemplated uses that are restricted are not allowed by exceptions to copyright holders' exclusive rights, such as fair dealing, the private copying regime, or the newly introduced four user provisions¹⁵ that I discuss in another scenario below in this chapter.¹⁶

¹⁰ For example, portions of the works that are not protected by copyright, or the right to transfer the copy of the copyright work is restricted, contrary to the application of the first sale doctrine, as discussed in Chapter 3 Part II F.

¹¹ Music CDs typically include a notice, such as "© [date], all rights reserved."

¹² See the discussion in Chapter 3 Part III C on online standard terms and conditions for the on line distribution of musical recordings, films and e-books.

¹³ The personal use or purposes is a requirement to determine the application of consumer law to a commercial transaction: see the discussion in Chapter 2 Part IV.

¹⁴ As those exclusive rights are set out in *CCA*, *supra* note 3, ss 3, 15,18,21,26.

¹⁵ Canada's *Copyright Modernization Act*, SC 2012, c. 20 [*CCMA*], amended the *CCA*, *supra* note 3 by adding exceptions to copyright holders' exclusive rights, i.e. s 29.21 "Non-commercial User-generated content", s

The question to be answered is whether consumers can have reasonable expectations of uses that give rise to consumer protection remedies with respect to acts exclusively reserved to copyright holders and that they have not authorized.. For instance, can lawful consumers reasonably expect to have the right to make private copies beyond the fair dealing provisions, the scope of the private copying regime, or the four user provisions recently introduced in Canada? If so, what are the implications under consumer protection law? To answer this question, I look at two approaches: one that focuses predominantly on the *opposability to all* nature of copyright and one that assesses the *opposability to all* nature of copyright as one of the factors to consider whether consumers' reasonable expectations are met. While my analysis looks predominantly at the application of consumer implied obligations (i.e., quality, fitness for use, and quiet possession), I also look at the implications of information disclosure requirements and provisions against unfair commercial practices.

A. Primary focus on the property attributes of copyright holders' exclusive rights

The approach presented here focuses predominantly on the property attributes of the exclusive rights of copyright holders, including the right to authorize the copying of their work, i.e., that the rights are *opposable to all*. From that perspective, no notification is required and therefore it is irrelevant whether terms and conditions advising consumers of their inability to make copies are present. Consumers are expected to be aware of the copyright holders' exclusive rights (*ignorantia juris neminem excusat*) to copy the copyright work.¹⁷ This approach leads to the least conducive application of implied obligations that would acknowledge consumers' uses beyond what copyright holders specifically authorize.

By selling copies of copyright works that preclude the possibility of making copies, copyright holders have simply withheld, as is their right, the authorization to make copies, that is, their "default position." Through that lens, it seems difficult to argue that the musical recording or film breaches the

29.22 "Reproduction for private purposes," s 29.33 "Fixing Signals and Recording Programs for Later Listening or Viewing" and s 29.24 "Backup Copies". I discuss the four new user provisions in Chapter 3 Part II D.

¹⁶ See the discussion in Part IV of this chapter.

¹⁷ In copyright law particularly, ignorance of copyright infringement or the good faith of copyright infringers is irrelevant to assess whether primary infringement took place or not under *CCA*, *supra* note 3, s. 27(1). However, knowledge of infringement is required for secondary infringement: s. 27(2). Absence of knowledge of copyright infringement by the infringer limits the remedies available to copyright holders: s 39.

implied obligation of description,¹⁸ merchantability,¹⁹ and of fitness for purpose.²⁰ At the very least, the requirements of these implied obligations would be met in the less generous jurisdictions within the Canadian consumer law landscape.²¹ The requirement that the copy of the copyright work complies with laws under the implied obligation of title and of quiet possession would be met as well.²² Similarly, suppliers limiting use of their copyright works in accordance with the copyright holders' exclusive rights could hardly be said to be using unfair practices.²³ By virtue of this analysis, copyright holders would not be in breach of their implied obligations for not permitting uses of copies of copyright works that are within their exclusive powers, including the power to authorize. This reasoning could hold even in the jurisdictions in Canada and elsewhere that base implied obligations on consumers' reasonable expectations,²⁴ on the basis that it would be unreasonable for consumers to expect copyright holders to grant consumers rights of use that copyright law specifically reserves exclusively to copyright holders and that they can authorize at their discretion.

In an analysis that gives prominence to the property nature of copyright, an argument may be made that in order to comply with the information disclosure requirements to disclose material information about the transaction, suppliers need to formally notify consumers that the copy of the work is subject to copyright and inform them of the relevant use restrictions.²⁵ On the one hand, this position may

¹⁸ See the discussion on statutory implied obligations of correspondence with description in Chapter 9 Part II B.

¹⁹ As discussed in Chapter 9 Part II A, the implied condition of merchantable quality is a fairly low standard to meet. All that is required is that the goods meet one of the purposes for which such goods are normally used which the unlimited listening or viewing of the musical recording or film would easily fulfill.

²⁰ I refer here to the implied obligations of fitness for a particular purpose which in most Canadian provinces and territories, require that the purpose be expressly or by implication brought to the attention of the distributor and that the consumer relied on the distributor's skill and judgment. Even if these two requirements have been broadly interpreted, it is not clear how the implied condition could find application in the present case: see the discussion in Chapter 9 Part II A.

²¹ See the discussion in Chapter 9 Part II. A.

²² See the discussion on the case law suggesting goods that do not comply with applicable laws can be in breach of the implied obligations of title and of quiet possession in Chapter 3 Part II C.

²³ I discuss the type of unfair practices prohibited under consumer law that are potentially relevant to the scope of permitted uses of copies of copyright works in Chapter 9 Part III.

²⁴ See the discussion on the legal regime of statutory implied obligations in Canada and the other jurisdictions examined here in Chapter 9 Part II A.

²⁵ This requirement flows from the information disclosure requirements imposed by consumer law to suppliers for distance and Internet agreements. See the discussion in Chapter 9 Part IV. See the report analysing the law of 11 jurisdictions (ie. some European countries and the US) by Marco B.M. Loos, Natali Helberger, Lucie Guibault, Chantal Mak, Lodewijk Pessers, Katalin J. Cseres, Bart van der Sloot, Ronan Tigner, "Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts" (2011) University of Amsterdam, Centre for the Study of European Contract Law (CSECL), Institute for Information Law (IViR), Amsterdam Centre for Law and Economics (ACLE), online: http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm at 88-89

contradict the intrinsic notification embedded in the *opposable to all* nature of copyright. On the other hand, as I discussed in Chapter 5, copyright may not sit comfortably with the *numerus clausus* principle and therefore be less able to embed the notification element that other forms of tangible property convey.²⁶ Also the consumer protection provisions that impose information disclosure requirements for distance contracts and Internet agreements²⁷ are *a priori* non-discriminating on the nature of the material information that needs to be disclosed.²⁸ In a market where different offerings of use of copyright works co-exist, for copyright holders to comply with their information disclosure requirements, consumers should be specifically informed of their rights of use. The argument is even stronger for less recent works that may no longer be subject to copyright protection than it is for newly created ones, on the basis of what consumers' reasonable expectations about the existence of copyright should be.²⁹ Even if consumers could successfully claim that copyright holders breached their information disclosure requirements, the remedies for breach of the information disclosure requirements are more limited than for breaches of an implied obligation.³⁰

While a focus on the property nature of copyright holders' exclusive rights is defensible in the context of the scope of application of consumer protection obligations, it sits uncomfortably with the remedial functions of consumer law. This approach may place a too great emphasis on the exclusive rights of copyright holders, while consumer law, by design, intervenes as a means to address the detrimental effects of suppliers' stronger powers and the various asymmetries that result therefrom.³¹ While copyright holders are entitled by law to restrict the performance of certain acts under copyright law, is it what consumers can reasonably expect, having regard to all the relevant circumstances? The analysis that looks at all relevant circumstances prevails in those jurisdictions in Canada and

where the authors make the argument that the right to make private copies or not can be considered as a material term under European consumer information disclosure requirements.

²⁶ See the discussion on the application of the *numerus clausus* principle to copyright in Chapter 5 Part IV C.

²⁷ I discuss the information disclosure requirements provisions in Chapter 9 Part IV.

²⁸ *Ibid.*

²⁹ I.e. that consumers ought to be aware that newly released musical recording or film is subject to copyright while this may not be true of older works, given that the exclusive rights conferred by copyright expire, generally 50 years after the life of the author: *CCA*, *supra* note 3, s 23, or even later in other jurisdictions.

³⁰ See the discussion on information disclosure requirements in consumer transactions in Chapter 9 Part IV.

³¹ Nicole L'Heureux, *Droit de la consommation*, 5^e édition (Cowansville, Qc: Yvon Blais, 2000) at 1-61. See generally the discussion in Chapter 10 on the theoretical justifications of consumer protection obligations.

elsewhere that assess consumer implied obligations through a consumers' reasonable expectations' test with a list of non-exhaustive factors.³²

B. Secondary focus on property attributes of copyright holders' exclusive rights

The approach that I present here considers the property attribute of copyright, i.e., being *opposable to all* as one of the factors to assess whether any implied obligation was breached by the supplier of copies of copyright works by restricting uses, such as the right to make copies of the works for personal use, but that for some reason would fall outside the exceptions to copyright infringement under the *CCA*.³³ In essence, under this approach, consumers' claim against copyright holders that the restricted use is a breach of an implied obligation (e.g., quality, fitness for purpose, or quiet possession) can be successful only to the extent that consumers can establish that their commercial transaction with copyright holders, as well as the other relevant factors, altered the default property regime of exclusive rights and exceptions that is set out in the *CCA*.

The statutory implied warranties under which goods are of an "acceptable quality"³⁴ or "satisfactory quality"³⁵ or that they are fit for the purposes for which such goods are supplied, as are applicable in some Canadian and other jurisdictions,³⁶ focus on consumers' reasonable expectations. With respect to copies of copyright works, quality and fitness for purpose can include the ability to make copies or to perform other acts specifically reserved to copyright holders.³⁷ To assess consumers' reasonable

³² See the discussion on the legal regime of statutory implied obligations in Canada and the other jurisdictions examined here in Chapter 9 Part II.

³³ *Supra* note 3. See the discussion on the exceptions to copyright infringement in Chapter 3 Part II. This is the scenario contemplated in the present Part II of this chapter. It includes uses that would fulfill most but not all of the conditions to meet one of the exceptions to copyright infringement in the *CCA*. For uses that are restricted by copyright holders but that fall under one of the exceptions to copyright infringement, see the discussion in Part IV of this chapter.

³⁴ The Saskatchewan *Consumer Protection Act*, SS 1996, c C-30.1 [*SCPA*], ss 48 (d) and 39 (a) provides a statutory warranty that goods sold by a retailer are of "acceptable quality" which is defined as "the characteristics and the quality of a consumer product that consumers can reasonably expect the product to have,[emphasis added] having regard to all the relevant circumstances of the sale of the product, including: (i) the description of the product;(ii) its purchase price; and (iii) the express warranties of the retail seller or manufacturer of the product; and includes merchantable quality within the meaning of *The Sale of Goods Act*".

³⁵ *Sale of Goods Act 1979* (U.K.), 1979, c. 54 [*UKSGA*], s14(2).

³⁶ This is the case in Saskatchewan, Québec, New Brunswick and the United Kingdom: see the discussion in Chapter 9 Part II A.

³⁷ Peter Rott, "Download of Copyright-Protected Internet Content and the Role of (Consumer) Contract Law" (2008) 31 J. Consum. Policy, 441 at 448 includes in the broader notion of "quality" the ability to make copies as part of the social life of many. See Loos & al, *supra* note 26 at 112 -114 who make the argument that in spite of

expectations, the relevant statutory provisions of implied obligations require the consideration of a non-exhaustive list of factors.³⁸ Among them, the existence of exceptions to copyright infringement, their legal nature and scope in the relevant jurisdiction,³⁹ including their proximity to the relevant restricted use,⁴⁰ the presence and clarity of notifications restricting the relevant use, including non-negotiated standard end-user agreements, representations and advertisement made outside the contract, industry norms of permitted uses, uses of available technological devices by consumers, and consumer surveys on expectations of uses would be considered.⁴¹ As for the property nature of copyright holders' exclusive rights, i.e., as *opposable to all*, the fact that they may not embed a notification element as strong as other forms of tangible property could also be a factor that would be taken into account.⁴²

The existence of non-negotiated standard end-user agreements or notifications that explicitly limit consumers' rights to make copies of the musical recording or film becomes more relevant under the present approach⁴³ than under the previous approach that focused predominantly on the property attributes of copyright as being *opposable to all* and as embedding the notice function.⁴⁴ The existence and quality of notifications restricting uses would be more relevant to determine the application of

copyright holders' exclusive rights to restrict the right to make copies, such restrictions do not necessarily conform with the contract under which they are supplied if they do not comply with consumers' reasonable expectations.

³⁸ L'Heureux, *supra* note 32 at 70.

³⁹ E.g. a regime within copyright law whereby users are allowed to make copies for their own private personal use under specific circumstances, such as the private copying regime in the *CCA*, *supra* note 3 ss 79 – 88, which applies solely to sound recordings or musical works, or the "Reproduction for Private Purposes" exception to copyright infringement: s 29.22. As to their nature, whether these permitted uses constitute users' rights or exceptions to copyright infringement would be another determinant factor: see the discussion below in Part IV of this chapter.

⁴⁰ For example, consumers who would make reproductions for personal uses but who would have circumvented a TPM to do so, which is one of the conditions that would disqualify the application of the reproduction for private purposes exception to copyright infringement in the *CCA*, *supra* note 3, s 29.22.

⁴¹ L'Heureux, *supra* note 32 at 70, enumerates the factors to be considered: the nature of the product, its function, the state of technology, the information transmitted by the distributor, and the terms of the contract.

⁴² See the discussion on the application of the *numerus clausus* principle to copyright in Chapter 5 Part IV C.

⁴³ I.e., the approach that considers the property nature of copyright as being *opposable to all* as one of the many factors to consider the application of consumer law obligations. In a European context, Rott, *supra* note 37 at 446ff. makes the distinction between consumer transactions whereby consumers are expressly notified of the presence of technological measure and their limitative effects on their usage of the copy and when they would not be. In the first case, notification would be sufficient to make this limitation compliant. However, in absence of notification, consumers' reasonable expectation would include the right to resell, lend the copy, download it and play it anywhere and anytime, but would not necessarily include an expectation of the ability to make copies of the work.

⁴⁴ See the discussion above in Part II A of this chapter.

statutory implied obligations. For instance, the notice “© all rights reserved” may not be sufficient on its own to set aside the application of mandatory statutory consumer implied obligations.⁴⁵ Under that approach, the *opposable to all* nature of copyright holders’ exclusive rights and the notification element that it entails would be taken into consideration within the broader framework of information disclosure, which is intrinsically part of statutory implied obligations as well as a formal requirement of specific forms of consumer agreements.⁴⁶ The evidence of an increasing commercial practice by other copyright holders allowing consumers to make multiple copies beyond what is permitted under the *CCA* or similar copyright statutes⁴⁷ would be weighed in when assessing whether the implied obligations of quality and fitness for purpose were breached by copyright holders.⁴⁸

Even in jurisdictions with less auspicious implied obligations of quality and fitness for purpose for consumers,⁴⁹ the consideration of a broader range of factors, beyond the ones dictated or within the control of copyright holders, is more consistent with consumer law objectives and the consumer law framework. For instance, the implied obligation of quiet possession within a consumer law framework would weigh in the widespread presence in the marketplace and use of multiple music- and film-playing devices (MP3s, PCs, cellphones, iPads, PVRs) against the exclusive rights of copyright holders to determine whether a limitation on making copies of the musical recording or film is a breach of the implied obligation of quiet possession,⁵⁰ or does not meet consumers’ legitimate expectations of fitness for the purpose for which copies of copyright works are normally used. In such case, an effective application of consumer protection law to support a use within the exclusive rights of copyright holders, but which, for lack of proper notification, leads to the breach of an implied

⁴⁵ Similar notices are not required under the *CCA*, *supra* note 3, for a work or other subject matter to be protected by copyright. See the discussion in Chapter 9 Part II on the effect of notices sold “as is” as not being sufficient to remove the application of mandatory statutory consumer implied obligations.

⁴⁶ See the discussion on consumer law information disclosure requirements in Chapter 9 Part IV.

⁴⁷ For instance, suppliers including Apple, allow users of iTunes to make multiple copies on multiple devices of music downloaded from the iTunes website, online: <http://www.apple.com/itunes/>. See the survey that I conducted on non-negotiated standard end-user agreements for the purchase of copies of musical recordings, films and e-books online in Chapter 3 Part III C.

⁴⁸ Loos & al, *supra* note 26 at 112-114.

⁴⁹ I.e., in some of the provincial jurisdictions in Canada, as discussed in Chapter 9 Part II.

⁵⁰ See the discussion on the scope of application of the implied warranty of quiet possession in Chapter 9 Part II C. Other factors to be weighed in include the nature of exceptions to copyright infringement, such as the private copying regime or the reproduction for private purposes (as mandatory rights or exceptions or not): see the discussion in Part IV of this chapter.

obligation, could act as a property-limitation rule, even more so to the extent that a court would order specific performance.⁵¹

If copyright holders are found in breach of their implied obligations (e.g., of quality, fitness, or quiet possession) for restricting certain uses of copyright works because they go against consumers' reasonable expectations, copyright holders can be subject to a panoply of remedies, including specific performance.⁵² In the case of specific performance, copyright holders would be required to allow acts to be performed with respect to their copyright works. Consumer law would then act as a property-limitation rule and limit the scope of rights that normally fall within the exclusive domain of copyright holders for the benefit of consumers in the context of specific consumer transactions. An award of specific performance was initially ordered in the French judgment in *Warner Music*,⁵³ with the effect that the copyright holder would have had to lift a technological measure that limited the devices on which a musical recording could be played. This order was reversed on appeal.⁵⁴ I discuss the *Warner Music* judgment further below in this chapter.⁵⁵ The application of other remedies available for breach of an implied obligation (i.e. damages, rescission of the contract, etc.) would not act as a property-limitation rule to the same extent.⁵⁶

Nothing should *a priori* preclude consumer law from acting as a property-limitation rule to restrain the scope of exclusive rights of copyright holders through a court ordering specific performance or other available remedies where, having regard to the relevant circumstances of the consumer transactions, the copyright holders breached an implied obligation. Under the present scenario, this would be possible only to the extent that consumers can establish that their commercial transaction with copyright holders and the other relevant factors altered the default property regime of exclusive rights and exceptions that is set out in the *CCA*. In other words, there could be a breach of a consumer

⁵¹ Remedies for breach of implied obligations often include specific performance including an obligation of repair: see the discussion in Chapter 9 Part II.

⁵² See the discussion on the scope and operation of consumer implied obligations in Chapter 9 Part II.

⁵³ Trib. gr. inst. 5^e Paris, 10 January 2006, *Christophe R., UFC Que Choisir / Warner Music France, Fnac*, (2006) JurisData: 2006-292685 [*Warner Music*] reversed on appeal: Court of Appeal 4^e A, Paris, 20 June 2007, *Fnac Paris / UFC Que Choisir et autres*, online: <http://www.legalis.net/jurisprudence-decision>; confirmed by Cour de cassation, civ. 1^{ère}, 27 Novembre 2008, *UFC Que Choisir / Fnac, Warner music France*, online: <http://www.legalis.net/jurisprudence-decision>.

⁵⁴ *Ibid.* I discuss the *Warner Music* judgment in Chapter 9 Part II A.

⁵⁵ See the discussion in Part IV of this chapter.

protection implied obligation only to the extent that an implied licence in copyright law could also be read into the transaction. Otherwise, granting consumers' claims would amount to allowing copyright infringement to take place.

C. Assessment

In this Part, I presented two approaches on the treatment of restricted uses that fall within the exclusive rights of copyright holders and whether they can give rise to breach of consumer law implied obligations. The first approach that emphasizes the property attributes of copyright and its opposability to all as the determining factor may be more aligned with a hierarchy of norms between property and contract and the application of the *numerus clausus* principle.⁵⁷ Copyright holders are legitimized by the rights that the CCA confers to restrict such uses, which plays an important notification function for consumers. As a result, there would be no legal base for the claim of a breach of a consumer law obligation. The second approach, that considers copyright holders' exclusive rights (as opposed to giving them predominance) as one of the factors to consider when assessing whether use restrictions are in breach of consumer law implied obligations, is more aligned to the corrective and remedial function of consumer law with respect to imbalances favouring suppliers, including copyright holders. Under this approach, copyright holders' exclusive rights to authorize works are only partially relevant to assess their compliance with consumer implied obligations if the commercial environment is such (e.g., prevailing non-restrictive usage offerings) that consumers can reasonably expect to perform certain acts and were not adequately notified of the usage restrictions by copyright holders.⁵⁸ The reason is that the consumers' reasonable expectations test effectively sets a standard that copyright holders need to meet having regard to the relevant surrounding circumstances as established on a case-by-case basis. Under that approach, the surrounding circumstances would have to infer a licence (implied licence) and the restriction to such inferred use would lead to a breach of the consumer law implied obligation. Rather than being in opposition, the two approaches reflect different emphases on the notification *per se* that results from the exclusive rights of copyright

⁵⁶ In such case, copyright holders would have to give effect to the remedy without limiting the exercise of their exclusive property rights by allowing the contested use. For the definition of a property-limitation rule, see Harris, *supra* note 1. See also the discussion in Chapter 4 Part V.

⁵⁷ See the discussion on the *numerus clausus* principle in Chapter 4 Part III.

⁵⁸ Commentators argue that the restriction of use would need to be prominent. Restrictive terms of use buried in lengthy non negotiated standard terms and conditions would not meet the notification requirement: see the report evaluating 11 jurisdictions (some European states and the U.S.): Loos & al., *supra* note 26 at 112-114.

holders. While the first approach that places more emphasis on the exclusive rights of copyright holders may be the more likely approach that courts will follow, the second approach may be more appropriate, depending on the other relevant surrounding circumstances, for the determination of an implied licence and the breach of a consumer implied obligation.

III. Uses that fall within the exclusive rights of copyright holders and are authorized with restrictions

The present scenario is similar to the previous scenario under which the contested usage restriction is part of the exclusive rights of copyright holders and is not otherwise permitted by the *CCA*.⁵⁹ The difference here is that copyright holders authorize consumers to make restricted uses only partially, e.g., time or territorial limitations apply to the authorization to perform acts otherwise restricted to the copyright holders' domain. Under the current scheme of the *CCA* and similar copyright statutes, any acts performed outside that authorization amount to copyright infringement. As a result of the commercial transaction, those acts would also amount to breaches of the contracts between copyright holders and consumers. The partial usage restriction could amount to the breach of an implied obligation only to the extent that the commercial transaction and relevant circumstances altered the default property regime created by the *CCA* by creating an inference or implied licence that would be broader than the partially restrictive use. The reasoning of the previous scenario would apply here with one distinction. The possibilities of partial authorizations of copyright holders' exclusive rights are potentially infinite, which illustrates once more that copyright sits uncomfortably with the *numerus clausus* principle.⁶⁰ From that perspective, the notification function embedded within copyright holders' exclusive rights as being opposable to all would be even weaker.⁶¹ As a result, compared to the previous scenario, the approach putting greater emphasis on the exclusive rights of copyright holders would be slightly less compelling in the present scenario and the approach putting less emphasis of the exclusive rights of copyright holders would be somewhat reinforced. Still, as the restricted acts are within the exclusive domain of copyright holders, a claim of breach of an implied obligation would be more difficult to make than when the restricted acts are either permitted by the *CCA* or fall outside copyright holders' exclusive rights, which are the two scenarios that I explore next.

⁵⁹ See the discussion in Part II of this chapter.

⁶⁰ See the discussion on the application of the *numerus clausus* principle to copyright in Chapter 5 Part IV C.

IV. Uses that fall within the exclusive rights of copyright holders' exclusive rights and are specifically authorized by the CCA

Under this scenario, copyright holders (distributors) restrict consumers' ability to perform acts that are within their exclusive domain (such as making copies of the musical recording or film, or telecommunicating it to the public, e.g., by posting it on the Internet), and yet they are acts that consumers can perform under copyright law. A usage that is a fair dealing⁶² or that is specifically allowed under the private copying regime or reproduction for private purposes of the CCA⁶³ would fall in that category. In property theory terms, by permitting those acts without the authorization of copyright holders in specific cases, copyright law creates a property-limitation rule on the exclusive rights of copyright holders.⁶⁴

In Chapter 3, I described the uncertainty in Canada and other jurisdictions on the nature of exceptions to copyright infringement (i.e., whether they are rights or mere defences), as well as whether they are mandatory or not.⁶⁵ I discussed how the recent introduction of TPMs in the CCA and other amendments had shaken the conception of users' rights as they were enunciated by the Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada* [CCH].⁶⁶ I discussed how those changes seriously undermine any arguments about the mandatory nature of some of the exceptions to copyright infringement and compromises the mandatory nature for the other exceptions that I examined.⁶⁷

Given these unresolved questions, I will apply here consumer protection law obligations to acts specifically authorized by the CCA, but restricted by copyright holders by considering two different hypotheses. Under the first hypothesis, exceptions (users' rights) to copyright infringement are

⁶¹ *Ibid.*

⁶² I.e. that falls within one of the purposes specifically enumerated in sections 29 to 29.2 of the CCA, *supra* note 3 (such as research and private study). In *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 at para 53ff., the Supreme Court set a legal test that comprises a non-exhaustive list of factors to consider when asserting whether the dealing is fair, and stated that the fair dealing provisions needed to be interpreted broadly.

⁶³ CCA, *supra* note 3, ss 79 - 88, 29.22.

⁶⁴ I.e. when the *prima facie* open-ended privileges of ownership are overridden: Harris, *supra* note 1 at 34. The operation and significance of property limitations is discussed in Chapter 4 Part V.

⁶⁵ See the discussion in Chapter 3 Part IV.

⁶⁶ *Supra* note 62 at para 48; *Ibid.*, in particular Chapter 3 Part IV B and C.

mandatory, and under the second one, they are not. Based on *CCH*, I will work under the assumption that the exceptions to copyright infringement are rights even though I have already expressed doubts as to their actual strength.⁶⁸ In each case, I will look into how legal claims under consumer law can supplement traditional claims for breach of contract and fill the gap in the *CCA*, as legislation that does not specifically contemplate legal claims and remedies for copyright consumers.

A. The exceptions to copyright infringement (users' rights) are mandatory

Although there is no definitive answer in Canada as to whether exceptions to copyright infringement are mandatory, I argued in Chapter 3 that a reasonable argument could be made with respect to some or all of the following exceptions, at least with respect to non-negotiated standard end-user agreements: fair dealing, non-substantial part, private copying regime, computer programs, and non-commercial user-generated content.⁶⁹

There are various situations in which lawful consumers can be constrained by contract or TPMs from performing certain acts on the commercial copies of copyright works that they purchased, that they would otherwise be authorized to do under copyright law. For instance, consumers may want to reuse parts of the musical recording of a song as part of an audio-visual original creation that they want to post on YouTube or on Facebook for non-commercial purposes. Non-negotiated standard end-user agreements would typically forbid such reuse.⁷⁰ Consumers or other users may want to reproduce a non-substantial part of a film as part of an online discussion forum of amateur film critics or for professional purposes but would be unable to do so without the consent of copyright holders because of the TPMs that apply to their DVD. Consumers or other users may want to reproduce and communicate to the public parts of a book in the context of a parody or satire but are restrained from doing so by the terms of the contract pursuant to which they purchased the e-book online. Consumers or other users may want to present portions of a musical recording at community training sessions on the effects of music on children, which would amount to a performance in public and would typically not be allowed under non-negotiated standard end-user agreements of commercial copies. And the list goes on and on.

⁶⁷ *Ibid.*

⁶⁸ See the discussion in Chapter 3, Part IV.

⁶⁹ See Chapter 3 Part IV B (i).

⁷⁰ See the discussion of non-negotiated standard terms and conditions in Chapter 3 Part IV C.

What is remarkable from the few examples of possible restrictions by contract or TPMs applicable to commercial copies of copyright works is that if it were not for the commercial transaction and restrictive contract clause or TPMs, users accessing copyright works through other means (e.g., by browsing the Internet) would be allowed to perform all of those acts *without the authorization* of copyright holders. Common wisdom would dictate that by entering into a commercial transaction with the copyright holders or their distributors, consumers would be placed in a more advantageous situation vis-à-vis any other user accessing the same copyright works. With respect to the application of exceptions to copyright infringement, the reverse is true. This leads to an absurd and counterintuitive result. Here the dissonance does not come from the law but from commercial practices that prevail in the field.⁷¹

If such exceptions to copyright infringement (users' rights) are mandatory under copyright law, the contract clause or TPMs restricting the permitted use would be unenforceable or would have to be lifted to allow consumers to perform the permitted use. The mandatory nature of the users' rights under copyright law could serve as the basis of a claim for breach of contract.⁷² The *CCA* does not specifically contemplate grounds of action or remedies for copyright consumers and other users.⁷³ What other claims are available under consumer law? To what extent are they more beneficial to copyright consumers than a traditional breach of contract claim?

The consumer law arguments that I will develop here have more strength, to the extent that the exceptions to copyright infringement that consumers invoke are rights, that is presently the assumption in Canada pursuant to *CCH*. To start with, a legal claim can be initiated on the basis of a right and usually cannot be invoked on the basis of a defence. The French cases *Warner Music*⁷⁴ and *Mulholland Drive*⁷⁵ illustrate that point.⁷⁶ To the extent that an exception to copyright infringement

⁷¹ See the sample review of online non-negotiated standard end-user agreements for the purchase of copies of musical recordings, films and e-books in Chapter 3 Part III C.

⁷² The breach could be based on unconscionability.

⁷³ The *CCA*, *supra* note 3, ss 34ff provides remedies in case of copyright infringement. Procedures for a declaratory judgment, eg., to confirm the lawfulness of acts performed on copyright works may be initiated by consumers and other users pursuant to relevant provincial /federal rules of procedure.

⁷⁴ *Supra* note 53.

⁷⁵ Cass civ. 1^{ère}, 28 February 2006, overruling *Studio Canal et al. v S. Perquin and Union federale des consommateurs Que choisir*, Paris Court of Appeal, 22 April 2005, available at <http://www.juricom.net/documents/caparis20050422.pdf>. [*Mulholland Drive*].

that is mandatory could give rise to a legal claim regardless of whether it is a right or not (e.g., breach of contract), the arguments that I develop here could also apply.⁷⁷

Any restriction on commercial copies of acts normally allowed without the authorization of copyright holders (under the present hypothesis that they are mandatory) would not be compliant with the *CCA* to the extent that the allowance of such acts is mandatory. On that basis, there is a reasonably strong argument that copyright holders (or distributors) who sell such restricted copies would be in breach of their implied obligations under consumer law. The implied obligations of quality, fitness for purpose, title, or quiet possession each contain, to various degrees, a requirement that the goods sold comply with law.⁷⁸ The non-compliance with law will trigger the breach of the implied obligation unless this “defect” was specifically brought to the attention of consumers.⁷⁹

In a quality or fitness for purpose analysis, there will be a breach of the implied obligation if the non-compliance with law limits or impairs the purposes for which such good is normally used,⁸⁰ or if consumers can reasonably expect that copies of copyright works comply with laws,⁸¹ depending on the jurisdiction considered. Under the current scenario, copies of copyright works that restrict consumers from making a fair dealing use of the work or copying the copyright work under the private copying regime would still allow consumers to play the musical recording or film within the framework of the *CCA*⁸² and any standard terms and conditions attached to the musical recording or film.

⁷⁶ In *Mullholland Drive*, *ibid*, the Cour de Cassation held that to make private copies of copyright works under French copyright law did not create rights but was an exception to copyright infringement. Therefore, restrictions on the ability to make private copies could not serve as the basis of a legal claim. The Court of Appeal came to the same conclusion in *Warner Music*, *supra* note 63. The judgment was upheld by the Cour de Cassation: *ibid*.

⁷⁷ I discuss the nature of exceptions to copyright infringement as rights or defences or as being mandatory in Chapter 3 Part IV.

⁷⁸ I discuss the nature and scope of the consumer protection implied obligations in Chapter 9 Part II.

⁷⁹ *Ibid*. For example, there would be no implied warranty of quality or fitness for purpose with respect to a good sold which requires a certification or a repair for it to be operational and compliant with laws, if the certification or repair is specifically brought to the attention of the consumer before the sale.

⁸⁰ This is the case in most jurisdictions in Canada. See the discussion in Chapter 9 Part II A of this chapter.

⁸¹ The jurisdictions applying the consumers’ reasonable expectation test to assess the scope of implied obligations of quality and fitness for purpose are: *SCPA*, *supra* note 34, s 48 (d) and 39 (a) ; Québec *Consumer Protection Act*, RSQ., c. P-40.1 [*QCPA*], s 37; *New Brunswick Consumer Product Warranty and Liability Act*, SNB 1978, c. C-18.1 [*NBCPWL*] s10 (1) (a); see also the *UKSGA*, *supra* note 35, s 14 (2); the *Supply of Goods and Services Act* 1982 (U.K.), 1982, c. 29 [*UKSGSA*], s 4(2).

It is reasonably safe to predict that copyright holders would normally not specifically notify consumers that they are not allowed to exercise acts specifically authorized by the *CCA*.⁸³ Non-negotiated standard end-user agreements listing acts that are permitted and restricted would not necessarily amount to a notification that consumers are not allowed to exercise acts specifically authorized by the *CCA*, such as fair dealing.⁸⁴ While the deficiency to comply with copyright law may not be a breach of implied obligations of quality or fitness for purpose in the jurisdictions where the standard to meet is relatively low,⁸⁵ it may be a breach in jurisdictions that ground the application of copyright holders' or distributors' implied obligations on the reasonable expectations of the consumer. In the latter case, the point of departure is whether consumers can reasonably expect that products are compliant with law,⁸⁶ whereas in the former case the question is framed around whether the deficiency of legal compliance makes the product of non-merchantable quality or disenable it to perform at least one of the purposes for which copies of copyright works are supplied.⁸⁷

There may be a stronger argument that copies of copyright works that do not comply with law breach the implied obligations of title and quiet possession. The jurisprudence on obligations of title and of quiet possession has qualified the failure of goods to comply with laws or regulations as breaches of the sellers' implied obligations.⁸⁸ It depends on how courts are willing to qualify the restrictions imposed by copyright holders on consumers' uses of copies of copyright works that would be otherwise permitted by law. The scope of the implied obligation of quiet possession is less clearly

⁸² *Supra* note 3.

⁸³ *Supra* note 3. See the survey conducted on selected non-negotiated standard end-user agreements in Chapter 3 Part C which typically do not contain reference to those acts that are specifically authorized by copyright law.

⁸⁴ See by analogy treatment by courts of contract clauses stating that a product is sold "as is" as not invalidating the application of implied obligations: *MacLeod v Ens*, [1982] 3 W.W.R. 653, 15 Sask. R. 73, 135 D.L.R. (3d) 365 (CA), *Radul v Daudrich* (1983) CarswellMan 135 [1983] 6 W.W.R. 278 (MCA) where the court held that a statement to the effect that a good was not of a merchantable quality and sold "as is" did not fulfill the statement of quality that could limit the application of the statutory warranties under the Manitoba's Consumer protection Act.; *Theriault v Roy* (1990) CarswellNB 169 109 N.B.R. (2d) 75, 273 A.P.R. 75 (QB) where the court held that a sale "as is" did not remove the implied warranty of quality and durability; see also *Munro v Central Auto Sales Ltd.* 1994 (1997) CarswellSask 798 (PC); *Parsons v Mont-Bleu Ford inc.* 2002 CarswellQue 2932 (CQ); *Adams v J & D's Used Cars Ltd.* (1983) CarswellSask 311 (QB) which involved a case where the implied statutory warranty of fitness for a particular purpose applied, given that plaintiff had specifically brought that purpose of the car to the attention of the vendor. The reference to a sale "as is" was of no legal effect for the application of the warranty.

⁸⁵ See the discussion in Chapter 9 Part II A.

⁸⁶ *Supra* note 81.

⁸⁷ See the discussion in Chapter 9 Part II A.

⁸⁸ See the discussion in Chapter 9 Part II C.

defined than implied obligations of quality or fitness for purpose.⁸⁹ By its terminology, and perhaps also by design, the implied obligation of quiet possession refers to a broader array of cases where the expectations of owners and possessors about their open-ended powers and privileges are compromised than is the case of implied obligations of title, quality, or fitness for purpose. The leading cases on quiet possession suggest that a constraint on how possessory or ownership rights can be exercised, even though not entirely impairing any use, can amount to a breach of the implied obligation of quiet possession.⁹⁰ The public policy aspects and balancing act between competing interests that these specific authorizations under the *CCA* embed could provide a strong argument that by unilaterally taking these permissions away, copyright holders are in breach of their implied obligation of quiet possession.

In addition to claims based on breaches of implied obligations of title, quiet possession, quality, and fitness for purpose, consumers could invoke a breach of copyright holders' information disclosure requirements.⁹¹ Typically, consumers are not explicitly notified when the restrictions imposed by copyright holders on their uses of copyright works restrict their ability to exercise fair dealing or other users' rights that would otherwise not require the consent of copyright holders.⁹² Consumer law imposes on sellers and distributors minimum disclosure information requirements for certain contracts,⁹³ the non-compliance with which gives rise to more limited remedies than in the case of breach of implied obligations.⁹⁴ Among the information disclosure requirements, any material term of the transaction needs to be disclosed to consumers.⁹⁵ Contractual restrictions on acts that are otherwise specifically authorized without the permission of copyright holders should be regarded as a material term of any transaction involving copies of copyright works.⁹⁶ The French Cour de Cassation

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ See the discussion in Chapter 9 Part IV A.

⁹² See the survey of selected online non-negotiated standard end-user agreements in Chapter 3 Part III C.

⁹³ Such as distance contracts and internet agreements. See the discussion in Chapter 9 Part IV A.

⁹⁴ The remedies for failure to disclose information required by law are more limited (e.g. include very limited time periods to cancel the contract) than with respect to the other consumer protection obligations examined in this chapter (i.e. which normally also include specific performance, damages, rescission of contract): see the discussion in Chapter 9 Part IV A.

⁹⁵ *Ibid.*

⁹⁶ Information disclosure requirements imposed for specific form of agreements require that any term material to the conclusion of the contract be disclosed in writing prior to the conclusion of the agreement: See the discussion in Chapter 9 Part IV A.

in one of the *Mulholland Drive* cases decided otherwise.⁹⁷ Having held that the ability to make private copies was a defence to copyright infringement and not a right, the Cour de Cassation held that any restriction on that ability did not constitute material information under the *French Code de la Consommation*.⁹⁸ The fact that under French law the private copying regime exception is not a right and is non-mandatory likely played an important role in the Court's judgment. Nevertheless, this should not preclude a restriction on the private copying exception to be material information. This is especially true given the underlying goal of consumer law to address asymmetry of information and bargaining power between sellers and consumers.⁹⁹ Given the complexity of copyright law, consumers should be informed of their basic rights (privileges) and how the commercial transaction alters them, even more so in non-negotiated standard end-user agreements.

Last but not least, a non-negotiated agreement that deprives consumers of rights that they would otherwise have by law could constitute an unfair practice.¹⁰⁰ Consumers may generally not be aware of acts that they can perform without the authorization of copyright holders.¹⁰¹ Yet those acts are permitted by copyright law to preserve and promote important public policy interests.¹⁰² The absence of notification of such restrictions, *inter alia* through the presence of TPMs, could amount to an unfair practice.¹⁰³ Another argument is that the contract term or TPM places the lawful consumer at a

⁹⁷ CA Paris, 4 April 2007, *Studio Canal et al. v S. Perquin and Union fédérale des consommateurs Que choisir*, Gaz. Pal. 18/07/2007 N° 199, p. 23., confirmed by the Cour de Cassation, Cass civ 1st, 19 juin 2008 (2008) Bull civ, I, N° 177.

⁹⁸ *Ibid.* More particularly *Code de la Consommation* art L111-1.

⁹⁹ See the discussion in Chapter 10.

¹⁰⁰ See Loos & al., *supra* note 26 at 199 where the authors recommend that terms in digital content agreements that would limit uses that are otherwise authorized by copyright law should be added to the list of terms that are presumed to be unfair under the "grey list" of unfair contract terms in European law regulation. I discuss the prohibition against unfair commercial practices in consumer law in Chapter 9 Part III.

¹⁰¹ See the discussion on the main clauses contained in selected online non-negotiated standard end-user agreements in Chapter 3 Part III C.

¹⁰² See the discussion on the nature of exceptions to copyright infringement in Chapter 3 Part IV.

¹⁰³ In a European context, this is the argument made by Peter Rott, "Download of Copyright-Protected Internet Content and the Role of (Consumer) Contract Law" (2008) 31 J. Consum. Policy 441 at 447ff. Relying on the EC, Council *Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, [1993] OJ L095, at 29 [Directive 93/13/EEC] and particularly the article regarding as unfair any non-negotiated contracts "if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer" the author argues that the non notification of technological protection measures that limits the exercise of private copying would be an unfair term. Once the limitation is specifically brought to the attention of consumers, it would no longer be an unfair term and such restriction would be in conformity with the contract. The author relies on article 6 of EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, [2001] OJ, L167/10 [Directive 2001/29/EC], that endorses technological protection measures that support copyright holders' rights to restrict private copying. The

disadvantage in comparison to other users who access the copyright work through other means and that, on that basis, the practice is unfair. An analogy can be made with consumer protection law provisions that forbid contract terms that deprive consumers of rights conferred by the law and limit their right of action before courts of law.¹⁰⁴ In the same vein, a contract term that substantially deprives consumers from exercising their rights under a law, i.e., the *CCA*, would constitute an unfair practice.

What additional benefits can the claims based on consumer law that I examined here bring to copyright consumers enforcing their rights against restrictions of uses of commercial copies of copyright works? What do they add to the non-enforceability of contract clauses or TPMs restricting acts otherwise permitted without the authorization of copyright holders under the *CCA*, on the basis that such authorizations are mandatory? First, consumer law eases the procedural requirements to make a claim,¹⁰⁵ and may provide additional remedies to consumers to those that would be available under breach of contract.¹⁰⁶ Second, in some jurisdictions, consumer protection offices have broad investigatory and remedial powers with respect to widespread commercial practices that violate consumer law.¹⁰⁷ The exercise by consumer protection offices of their power to intervene with respect to widespread unfair commercial practices could bring more immediate effective results with a broader reach than individual litigation.

To sum up, copyright holders who limit uses otherwise permitted by the *CCA* based on the hypothesis that such authorizations are mandatory, either through contractual restrictions or TPMs,¹⁰⁸ would be potentially in breach of the consumer protection obligations discussed here, and even more likely so in the more auspicious provincial jurisdictions with broader consumer law obligations.¹⁰⁹ In addition to supporting consumers' claims through various remedies, restrictions of uses otherwise permitted by

exception to this interpretation would be in jurisdictions where the right to make private copies is mandatory, such as in Belgium.

¹⁰⁴ See Ontario *Consumer Protection Act*, SO 2002, c. 30, schedule A, [*OCPA*] s. 7; *QCPA*, *supra* note 81, s. 11.1.

¹⁰⁵ See Chapter 8 Part I.

¹⁰⁶ See the discussion in Chapter 9 Part II, Part III and Part IV on the various remedies available for breach of implied obligations, information disclosure requirements and prohibition against unfair practices.

¹⁰⁷ See the discussion on the prohibition against unfair commercial practices Chapter 9 Part III.

¹⁰⁸ And other jurisdictions around the world in a similar situation as Canada: see *supra* note 641, or who have adopted technological protection measures that subject the prohibition of circumvention acts to copyright infringement.

¹⁰⁹ See *supra* note 81.

the *CCA* are one area where the special investigatory and remedial powers of consumer protection offices could be applied and be of assistance to, and raise awareness about, copyright consumers' claims.

B. The exceptions to copyright infringement (users' rights) are not mandatory

Under the present hypothesis, the exceptions to copyright infringement or users' rights can be overridden by contract or TPMs. The following users' rights recently introduced in the *CCA* likely fall in that category: i.e., (i) the reproduction for private purposes, (ii) later listening or viewing, and (iii) backup copies exceptions to copyright infringement.¹¹⁰ Two of these three exceptions to copyright infringement pertain specifically to owned or licensed commercial copies.¹¹¹ The argument that the restriction would place the consumer at a disadvantage vis-à-vis other users who did not enter into the commercial transaction does not apply here as the acts allowed by the *CCA* only pertain to lawfully purchased, licensed copies of copyright works.¹¹² The fact that these three exceptions are made explicitly subject to the non-circumvention of TPMs suggests that they are not mandatory.¹¹³ This contrasts with other exceptions to copyright infringement,¹¹⁴ although the reasoning that I develop in this section would also apply to them to the extent that they are found to be non-mandatory.¹¹⁵

Various examples of usage restrictions come to mind under the present hypothesis. An avid music consumer purchases ten CDs and buys several musical recordings online, only to find out that he is unable to copy half of them to various playing devices for personal consumption, as he would typically do, because the musical recordings are protected by TPMs. A similar scenario occurs to a consumer who cannot make otherwise permitted backup copies for the same reason. In another case, a consumer purchases a device allowing recordings for later viewing, only to find out that she is unable

¹¹⁰ See the discussion in Chapter 3 Part IV B and C.

¹¹¹ i.e. the reproduction for private purposes and backup copies exceptions to copyright infringement: see the discussion in Chapter 3 Part II D (ii) and (iv).

¹¹² *Ibid.* In the case of the Later listening or viewing exception (*CCA*, *supra* note 3, s. 29.23) the program needs to have been received legally (s 2.23 (1) (a)): see the discussion in Chapter 3 Part II D (iii).

¹¹³ An argument could be made that the exceptions to copyright infringement cannot be set aside by contract but are only subject to TPMs as provided by the relevant provisions in the *CCA*, *supra* note 3: See the discussion in Chapter 3 Part IV B (ii) and Part C.

¹¹⁴ This is the case for the application of fair dealing, the non-substantial part doctrine, the private copying regime, computer program exceptions, exhaustion or first sale doctrine and the non-commercial user-generated content rights: see the discussion on whether these exceptions to copyright infringement are mandatory in Chapter 3 Part IV B (i).

to use this recording capability with at least three of her favourite shows to which TPMs apply. The list goes on and on. In all those cases, the *CCA* explicitly endorses such commercial restrictions.¹¹⁶

If exceptions to copyright infringement are not mandatory under the *CCA*, it follows that the commercial practice to override them by contract or through the application of TPMs is not inconsistent with the *CCA*. It also means that consumers could not invoke a breach of contract on the basis of restrictions imposed on non-mandatory users' rights. If consumer law provides grounds to successfully challenge contractual restrictions that limit the exercise of exceptions to copyright infringement, it would allow consumers to strengthen their usage rights in a way that copyright law does not currently permit.

Claims made under consumer law to challenge restrictions of uses that go against consumers' non-mandatory users' rights are less likely to be successful than if the commercial practice restricts the performance of users' rights that are mandatory, which I explored under the previous hypothesis.¹¹⁷ Because the users' rights are not mandatory, consumers would not be able to claim that the commercial practice does not comply with law, which provides grounds to successfully claim a breach of the implied obligations of quality, fitness for purpose, and quiet possession.¹¹⁸

A claim based on a breach of implied obligations of quality and fitness for purpose would also be less likely to succeed, although not impossible, particularly in those jurisdictions that base the application of the implied obligations on consumers' reasonable expectations.¹¹⁹ To assess consumers' reasonable expectations, these statutory provisions require the consideration of a list of non-exhaustive factors.¹²⁰ Factors that would support consumers' claims would include the fact that the permitted acts under the *CCA* are users' rights as opposed to mere defences.¹²¹ Industry practices allowing consumers to perform the permitted acts freely would be another. The absence of an explicit notification advising consumers that they are restricted to exercise acts that are otherwise permitted by copyright law would

¹¹⁵ See the discussion in Chapter 3 Part IV C.

¹¹⁶ See the discussion in Chapter 3 Part II D (ii) to (iv).

¹¹⁷ See the discussion in Part IV A of this chapter.

¹¹⁸ *Ibid.*

¹¹⁹ *Supra* note 81. See also the discussion on implied obligations in Chapter 9 Part II.

¹²⁰ *Ibid.*

¹²¹ See the discussion on the nature of exceptions to copyright infringement in Chapter 3 Part IV A.

be an important factor.¹²² The fact that the users' rights under the *CCA* are explicitly not mandatory would be one factor that would weigh against consumers' reasonable expectations that they could exercise such users' rights, but it would not in and of its own be conclusive. The existence of the user right, even if it can be overridden by contract, can serve as a base to set expectations that the acts that it allows can be performed. Ultimately, a breach of the implied obligations of quality or fitness for purpose can be found if the restrictions of use failed to meet consumers' reasonable expectations, regardless of whether copyright holders are entitled to limit those acts.¹²³

In addition to a potential breach of consumer implied obligations, copyright holders applying TPMs that restrict consumers' ability to perform acts that they would be otherwise authorized to do under copyright law, were it not for the TPMs, may be in breach of their information disclosure requirement obligations and their restrictions could constitute an unfair commercial practice.¹²⁴ The analysis that I presented under the hypothesis that copyright users' rights are mandatory would also apply here.¹²⁵ Claims alleging unfair commercial practices are less likely to be successful with respect to restrictions on users' rights that pertain solely to lawfully owned or licensed copies.¹²⁶ In that case, consumers cannot claim that they are placed at a disadvantage vis-à-vis copies of copyright works available through other means.¹²⁷

To sum up, claims alleging breach of consumer implied obligations are less likely to be successful with respect to users' rights that are non-mandatory under the *CCA* than with respect the users' rights that are. Claims alleging breach of information disclosure requirements or unfair commercial practices could be successful, but to a lesser extent, with respect to restrictions on users' rights that pertain

¹²² See the discussion on the scope of implied obligations in Chapter 9 Part II.

¹²³ I.e. in those jurisdictions where reasonable expectations test applies regarding implied obligations: see *supra* note 81. The argument that I make here goes along the same lines as the one that I made in Part II of this chapter with respect to the application of consumer obligations to restricted acts that specifically require the authorization of copyright holders.

¹²⁴ I discuss the scope of prohibitions against unfair commercial practices and the information disclosure requirements in consumer law in Chapter 9 Part III and IV.

¹²⁵ See the discussion in Part IV A of this chapter.

¹²⁶ I.e. the reproduction for private purposes, and backup copies' exceptions to copyright infringement (*CCA*, *supra* note 3, ss 29.22, 29.24).

¹²⁷ As this would be the case with respect to exceptions to copyright infringement that do not impose a requirement that the exercise of the exception can only be made with respect to a lawful copy that the user owns: e.g., fair dealing, the non-substantial part doctrine, the private copying regime, computer program exceptions, and the non-commercial user-generated content rights: see the discussion on whether these exceptions to copyright infringement are mandatory in Chapter 3 Part IV B (i).

solely to lawfully owned or licensed copies. The last scenario that I explore in this chapter targets use restrictions on commercial copies of copyright works that move further away from the sphere of copyright holders' exclusive rights as conferred by the *CCA*. How consumer law responds to such user restrictions is what I explore next.

V. Uses outside the realm of the exclusive rights of copyright holders

Unlike the three scenarios examined so far,¹²⁸ the scenario explored here concerns use limitations that are outside the realm of copyright holders' exclusive rights. It includes cases where use restrictions (including through the application of TPMs) apply to works not protected by copyright (e.g., works that are in the public domain, that are supplied with works subject to copyright). It includes instances where copyright holders seek to limit consumers' right to transfer their ownership in commercial copies of copyright works embedded in physical objects (DVDs or CDs) that were initially transferred with copyright holders' consent.¹²⁹ It also includes restrictions on playing devices and territorial or time restrictions that do not involve any act exclusively reserved to copyright holders.¹³⁰ Under the present scenario, any violation of the use restriction would be a breach of contract that would not involve copyright infringement. Consumer law would not act as a property-limitation rule as its effects would not limit the exclusive property rights of copyright holders.¹³¹ Rather, it would intervene in the contract sphere, outside the realm of their exclusive rights.

The treatment of the restrictions of use that are outside the realm of the exclusive rights of copyright holders shares some similarity with the third scenario that I explored in this chapter.¹³² The application of TPMs restricting the use of a large portion of works not protected by copyright that are

¹²⁸ I.e., “uses that fall within the exclusive rights of copyright holders” and “uses that fall within the exclusive rights of copyright holders and that are authorized with limitations” and to some extent, “uses that fall within the exclusive rights of copyright holders and that are specifically authorized by the *CCA*” (Part II Part III and Part IV respectively of this chapter).

¹²⁹ In that case, the limitation on the right to transfer the physical object embedding the copyright work would go against the application of the exhaustion or first sale doctrine: see the discussion in Chapter 3 Part II F.

¹³⁰ For example, TPMs that would render the copy of a musical recording unusable after playing the song 30 times, as opposed to a time or territorial limitation that would restrict the performance of acts exclusively reserved to copyright holders, which is the scenario that I explore in Part III of this chapter.

¹³¹ See Harris, *supra* note 1.

¹³² I.e., “uses within the realm of copyright holders' exclusive rights and specifically authorized by copyright law,” as discussed in Part IV of this chapter and more specifically Part IV A, under the hypothesis that the exceptions to copyright infringement are mandatory.

supplied with a significantly lesser portion of works protected by copyright could give rise to a breach of consumer implied obligations¹³³ and even be an unfair commercial practice.¹³⁴ The doctrine of copyright misuse,¹³⁵ which shares concerns that are similar to the application of sanctions against unfair commercial practices in consumer law,¹³⁶ could also apply here. Where all the works supplied are not protected by copyright and are subject to TPMs restricting access and use, consumer protection obligations would apply to these usage limitations without the interaction of the exclusive rights of copyright holders.¹³⁷ The application of TPMs could raise concerns about unfair practices, including on the ground that the application leads consumers to believe that the works are protected by copyright and on the basis that the restrictions are undue and not legitimate, having no legal foundation.¹³⁸

Usage restrictions that limit consumers' ability to use commercial copies of copyright works they own by limiting the amount of times they can play the song, film, or read the book, or the devices on which they can play such works also fall under the present scenario. The usage restrictions limit acts that are outside the exclusive rights of copyright holders: they do not seek to limit consumers from making a copy of the musical recording or film, telecommunicating it to or performing it in public, or distributing the copyright work.¹³⁹ The right to play the copy of the film or musical recording for an

¹³³ *Ibid.*

¹³⁴ I discuss the nature and scope of prohibitions against unfair commercial practices in Chapter 9 Part III.

¹³⁵ The doctrine of copyright misuse is a defence in U.S. copyright law to copyright infringement under which the alleged infringer invokes the abusive use by the copyright holder of her exclusive rights, which may or may not involve anti-trust considerations. In Canada, the intersection between competition law and the use of exclusive intellectual property rights, including copyright is addressed *inter alia* by the Competition Bureau, Intellectual Property Enforcement Guidelines, 2000, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01286.html>. I refer to various legal doctrines that limit the exercise of copyright holders' exclusive rights in Chapter 3 Part III A.

¹³⁶ E.g., an imbalance in the contractual relationship that has detrimental effects for consumers: For example: "taking advantage of a consumer by including in a consumer agreement terms or conditions that are harsh, oppressive or excessively one-sided" is one example of an unfair practice: *SCPA*, *supra* note 34, s. 6 (q); See also *OCA*, *supra* note 104, s. 15(2) e). *OCA*, *supra* note 104, s. 15(2) (f) provides that one of the elements to consider as to whether a practice is unconscionable or not is "that the terms of the consumer transaction are so adverse to the consumer as to be inequitable."

¹³⁷ I.e., there is no exercise of copyright holders' exclusive rights which affect consumers' reasonable expectations of use.

¹³⁸ I discuss the consumer protection provisions sanctioning unfair commercial practices in Chapter 9 Part III.

¹³⁹ *CCA*, *supra* note 3, ss 3, 15, 18, 21 and 26. Uses beyond what is permitted by the contract would not constitute copyright infringement.

unlimited time, in unlimited territories¹⁴⁰ flows from consumers' *prima facie* open-ended powers and privileges as owners of the commercial copies of copyright works.¹⁴¹

In the jurisdictions with narrower implied obligations of quality and fitness for purpose,¹⁴² usage restrictions affecting uses of copies of copyright work by territory, duration, or types of playing devices and that are outside the exclusive rights of copyright holders may be in breach of the statutory implied obligations of copyright holders (distributors) unless the usage restrictions are specifically brought to the attention of consumers. The specific notification of these usage restrictions to consumers is relevant to determine their application.¹⁴³ The usage restrictions would likely fall under the material information that needs to be disclosed to consumers under consumer law information disclosure requirements.¹⁴⁴

With respect to consumer protection implied obligations, even in the absence of a specific notice of the usage restrictions or in presence of a general limitation notice,¹⁴⁵ they may still meet the low threshold of merchantability, although this would be a harder case to make than if consumers are specifically notified of the limitations at the time of purchase.¹⁴⁶ It would depend on the weight given to the *prima facie* open-ended powers and privileges associated with ownership or possession of commercial copies of copyright works for an indefinite duration.¹⁴⁷ The usage restrictions limiting the duration, territory, or playing devices still allow consumers to play their copies of copyright works within defined boundaries, which may be sufficient for courts to decide that they are of a merchantable quality.¹⁴⁸ The broader application of the implied obligation of fitness for a particular purpose¹⁴⁹ would follow a similar analysis to the one of the implied conditions of merchantability.

¹⁴⁰ This is subject to any restriction on parallel imports, for instance as it applies in Canada with respect to books: see *CCA*, *supra* note 3, s 27.1.

¹⁴¹ See the discussion in Chapter 7 Part III A (iii) on how ownership in copies of copyright works can act as a property-limitation rule of copyright holders' exploitation of their copyright works.

¹⁴² See the discussion in Chapter 9 Part II A.

¹⁴³ *Ibid.*

¹⁴⁴ See the discussion on consumer law information disclosure requirements in Chapter 9 Part IV.

¹⁴⁵ Such as "limitations of use apply". Overarching limitations including "sold as is" have generally been held to be not sufficient to notify the consumer of certain characteristics of the good under which the implied obligation would not apply, and even more so in those jurisdictions where the implied obligations of seller cannot be overridden by contract: see discussion in Chapter 9 Part II A.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

With respect to the narrower application of the implied condition of fitness for a particular purpose, consumers would be less likely to be successful in establishing a breach of that implied obligation by copyright holders or distributors than under the broader application of this implied obligation.¹⁵⁰

Under the scenario where there is no notification of the usage restrictions affecting uses of copies of copyright work by territory, duration, or types of playing devices and that are outside the exclusive rights of copyright holders, consumers may also be able to successfully claim that these limitations breach the implied obligation of quiet possession.¹⁵¹ The implied obligation of quiet possession may give even greater consideration to the general features of the open-ended privileges and powers that come with ownership and possession for an indefinite duration than under the implied obligations of quality or fitness for a particular purpose.¹⁵² The focus shifts away from issues of specific features or performance of the goods that are characteristic of the implied obligations of quality and fitness for purpose.¹⁵³

If copyright holders specifically notify consumers of such limited uses (e.g., on the box cover of the CD or DVD or in the online terms and conditions) there would be no implied obligation of merchantability and of fitness for a particular purpose applicable to these limitations.¹⁵⁴ For the same reason, an argument that these limitations would breach the implied obligations of title and of quiet possession would most likely fail.¹⁵⁵ Finally, a general distinction needs to be made between the jurisdictions within that group where the implied obligations can be overridden by contract¹⁵⁶ and

¹⁵⁰ Unless a specific purpose (for example use on a precise playing device) was expressly or by implication brought to the attention of distributors and that the consumers relied on the distributors' skill and judgment, *Ibid.*

¹⁵¹ See the discussion in Chapter 9 Part II C.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ See the discussion in Chapter 9 Part II A.

¹⁵⁵ At least in the majority of jurisdictions where the application of implied obligations of title and of quiet possession is tempered by any circumstances around the contract that show a different intention: Ontario *Sale of Goods Act*, RSO 1990, c. S-1 [*OSGA*] s. 13; Alberta *Sale of Goods Act*, RSA 2000, c. S-2 [*ASGA*], s. 14; Nova Scotia *Consumer Protection Act* RSNS 1989 c. 92 [*NSCPA*], s. 14; Prince Edward Island *Sale of Goods Act*, RS PEI 1988, c. S-1. [*PEISGA*], s. 14; British Columbia *Sale of Goods Act*, RSBC 1996 c.410 [*BCSGA*], s.16. The implied warranty of freedom from encumbrance does not apply with respect to such encumbrances that were declared or known to the buyer before the contract of sale was entered into: *OSGA*, s. 13(c); *ASGA*, s. 14(c); *NSCPA*, s. 14(c); *PEISGA*, s. 14(c); *BCSGA*, s. 16 (C).

¹⁵⁶ The mandatory nature of implied obligations is discussed in Chapter 9 Part II.

would have been successfully excluded, from the jurisdictions where the implied obligations are mandatory.¹⁵⁷

Consumers may be generally more successful claiming that restrictions of use, such as limited durations, territory, and playing devices, breach the statutory implied obligations of copyright holders (distributors) in the other Canadian jurisdictions, including some jurisdictions outside Canada that apply a test of consumers' reasonable expectations.¹⁵⁸ The test for the application of the statutory implied obligations of sellers is assessed by a non-exhaustive list of factors to assess what is "acceptable quality" or what are the purposes for which such goods are normally intended.¹⁵⁹ Under that framework, more emphasis may be placed on other factors, such as the widespread presence in the marketplace and use of playing devices and how they may reasonably shape consumers' expectations. This would be particularly the case in instances where such limitations were not specifically brought to the attention of consumers or where there was only a general notice of use restrictions.¹⁶⁰

The absence of specific notification of these limitations to consumers would be an important factor to consider when assessing what their reasonable expectations should be with respect to these use limitations. Conversely, the notification of these limitations would be an important factor to assess consumers' reasonable expectations with respect to the copy of the musical recording or film and whether it should have been provided with or without limitations as to duration, territory, or types of playing devices. In that case, the quality and efficacy of the notification would be weighed against the other relevant factors, including whether consumers had actual knowledge of the limitations at the time of purchase. In some cases, the specific notification of those limitations could remove the application of the implied obligations of quality and fitness for purpose if such notification amounts to a "defect" specifically brought to the attention of the consumer.¹⁶¹ The contractual restrictions

¹⁵⁷ *Ibid.*

¹⁵⁸ *Supra* note 81.

¹⁵⁹ *Ibid.*

¹⁶⁰ See *supra* note 84.

¹⁶¹ *SCPA*, *supra* note 34, s 48 (d) provides that the implied warranty of acceptable quality does not apply: (i) respecting defects specifically drawn to the consumer's attention before the contract is made; or (ii) where the consumer examines the product before the contract is made, respecting defects that examination ought to have revealed. These exceptions were applied in: *Martel v Siman* (2002) 2002 SKPC 74. See also *NBCPWL*, *supra* note 81, s 10(2). There is no specific exclusionary language in the *QCPA*, *supra* note 81. However, courts have tended to assimilate statutory warranties of fitness for purpose and of durability in sections 37 and 38 of the

imposed on consumers, as discussed here, may in some cases amount to unfair practices.¹⁶² They may also raise other legal issues relating to interoperability that are not discussed here.¹⁶³

As we saw in the *EMI Music France*¹⁶⁴ and *Sony France and Sony United Kingdom*¹⁶⁵ cases, depending on its nature, the unfair practice prohibition may not act as a property-limitation rule on copyright holders' exclusive rights but simply require that consumers be notified of the use limitations.¹⁶⁶ In other cases, the limitations on copyright holders' contractual rights under the present scenario, resulting from the application of consumer protection obligations, could act as a property-limitation rule.¹⁶⁷ Even though the limitation would limit a contractual term, and not exclusive property rights of copyright holders *per se*, such limitation would operate on their freedom of contract, which derives from and is a prerogative of their exclusive property rights conferred by copyright.¹⁶⁸

To sum up, use restrictions that apply to works not protected by copyright, i.e., beyond the scope of the exclusive rights of copyright holders, are the most likely to give rise to breaches of consumer implied obligations and are the least likely to meet consumers' reasonable expectations test. In some cases such use restrictions could amount to unfair practices. A restriction of use limited in time, to a territory, or to specific devices, but that does not involve performing an act exclusively reserved to copyright holders, can breach the consumer implied obligations of quality and fitness for purpose with more likelihood of success in jurisdictions that base their implied obligation of quality and fitness for

QCPA as warranties against latent defects, which brings a similar legal analysis with respect to whether the defect had been disclosed to the buyer: see the discussion further below in Part II A of this chapter. For a narrow interpretation of statutory warranty of fitness for purpose (*QCPA*, *supra* note 18, art. 37) see: *Boivin c. Honda Canada inc.* (2000) CarswellQue 2741 (CQ) where the court found that this warranty had not been breached by a recreational vehicle sold without a side mirror and without rear breaking lights. The recreational vehicle could still be used for a purpose for which it was intended (i.e. on properties where there was no road safety requirement to have such features).

¹⁶² The consumer protection law prohibitions against unfair practices are discussed in Part III B. of this chapter.

¹⁶³ Rott, *supra* note 103, in particular at 445, discusses the issue of interoperability as it applies to copies of copyright works.

¹⁶⁴ CA Versailles, 30 September 2004, *S.A. EMI Music France v Association CLCV*, online: <http://www.foruminternet.org/documents/jurisprudence/lire.phtml?id=809> [*EMI Music France*, 2004].

¹⁶⁵ Trib gr instance Nanterre, 6th chamber, 15 Decembre 2006, *Association UFC Que Choisir v Société Sony France, Société Sony United Kingdom Ltd*, online: http://www.legalis.net/jurisprudence-decision.php3?id_article=1816 [*Sony France and Sony UK*].

¹⁶⁶ *Ibid*; *supra* note 164. See generally the discussion in Chapter 3 Part III.

¹⁶⁷ E.g. in cases where specific performance would be granted as a remedy, ordering that the usage restriction imposed by copyright holders be removed.

¹⁶⁸ See the discussion in Chapter 3 Part III A.

purpose on consumers' reasonable expectation than in the jurisdictions that imply an obligation of "merchantable quality." It can also amount to breach of the implied obligation of quiet possession and, based on the circumstances, amount to an unfair practice. In all cases, the notification of the restriction and its degree of prominence will play an important role in assessing whether there is a breach.¹⁶⁹

VI. Goods v. services

In Chapter 8, I discussed the uncertainty about the distinction between goods and services and, in particular, as the distinction pertains to the nature of commercial copies of copyright works.¹⁷⁰ While information disclosure requirements and prohibitions against unfair commercial practices generally apply equally to goods and services, in some jurisdictions, in Canada and elsewhere, statutory implied obligations of quality, fitness for purpose, title, and quiet possession only apply to goods.¹⁷¹ I have argued that singling out services from the application of implied obligations is less and less justified in an environment of standardized automated services, and that consumers should be able to rely on similar minimum standards of protection to the ones that relate to goods, with the necessary adaptations.¹⁷²

The distinction between goods and services is highly pertinent as consumers experience copyright works through increasingly diversified commercial offerings. In addition to traditional offerings of (digital) commercial copies embedded in a physical object, whether they are sold, rented, or licensed, consumers can download a commercial copy of the musical recording, book, or computer program that will allow them to consume it for indefinite duration, or they can subscribe to streaming services of films on the Internet.¹⁷³ Consumers can acquire a commercial copy of a musical work or book that they then store on the Internet for convenience. Consumers can record and replay TV broadcasts on their personal video recorder box or can benefit from similar service offered directly from their TV service provider.

¹⁶⁹ This is the case for the application of consumer implied obligations, unfair practices provisions and information disclosure requirements which are discussed in Chapter 9 Part II, Part III and Part IV.

¹⁷⁰ See in particular the discussion in Chapter 8 Part II B.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ For example, offerings of suppliers like NetFlix and the like: see the discussion on non-negotiated standard terms and conditions of commercial copies of copyright works in Chapter 3 Part III C.

Based on my analysis of the application of consumer law conducted so far,¹⁷⁴ implied obligations of quality, fitness for purpose, title, and quiet possession are more likely to be breached by copyright holders' usage restrictions regarding commercial copies that consumers own (rent or license) than with respect to a service that consumers access to enjoy a copyright work. Consumers generally have different expectations vis-à-vis a commercial copy that they acquire than in relation to a service that they enjoy. The questions of course are the extent to which consumers can always appreciate the distinction between the two and what are the terms of the commercial transaction they enter into.¹⁷⁵ Otherwise, the main issues of contention, e.g., the ability to make multiple copies of the work for personal use or backup purposes, to communicate the work to the public, the ability to transfer the ownership in the commercial copy (and the application of the first sale or exhaustion doctrine) will not arise if consumers enjoy copyright works through services rather than through a commercial copy they own (rent or license). Copyright holders' restrictions that impair consumers' ability to produce derivative works or to exercise a fair dealing on the work could, in theory, arise with respect to services, but are less likely than with respect to commercial copies of copyright works that consumers own. Experiencing copyright works through services do not empower consumers with the same degree of autonomy of usage as owning a copy does.¹⁷⁶ The *prima facie* open-ended powers and privileges that flow from ownership in a resource and the underlying values that support them do not manifest themselves in the same manner, if at all, when consumers experience services.¹⁷⁷

Restrictive usages of copyright works can give rise to other issues of quality, fitness for purpose, and quiet possession (with the necessary adaptations) that are specific to services providing access to copyright works. For instance, a TV service provider offering whereby consumers can replay TV broadcasts at their leisure could breach the minimum standards imposed by implied obligations if, for instance, TPMs restrain the replay of an important proportion of TV broadcasts. Other breaches of implied obligations of quality, fitness for purpose, title, and quiet possession (with necessary adjustments) may apply to services providing access to copyright works. They are of no concern to

¹⁷⁴ I.e., Chapters 8, 9, 10 and 11.

¹⁷⁵ See the review of a survey conducted on selected non-negotiated standard end-user agreements in Chapter 3 Part III C where I discuss how certain terms refer to purchases of copies while they then refer to licensing of copies and discuss services and purchases without making clear distinctions between the two.

¹⁷⁶ See the discussion on the central role of the presence of copy ownership to distinguish goods and services and on the different level of autonomy that it confers to consumers in Chapter 8 Part II B.

¹⁷⁷ *Ibid.*

the present discussion because they are similar to breaches that can arise with other types of services that are unrelated to copyright works.¹⁷⁸

VII. Conclusion

In this chapter, through four scenarios, I investigated the extent to which consumer law can support claims to strengthen copyright consumers' rights against copyright holders' restrictive terms of use.¹⁷⁹ More specifically, I developed arguments on how restrictive terms of use of commercial copies of copyright works potentially breach consumer (implied) obligations. I looked at the function and operation of consumer law in comparison with copyright law in support of copyright consumers' rights to commercial copies of copyright works. In contrast with copyright law, which often regulates the relationship between copyright holders and end-users indiscriminately of the legal relationship between the two,¹⁸⁰ consumer law intervenes on the basis of a commercial transaction pertaining to copyright works and, in some cases, acts as a property-limitation rule on copyright holders' exclusive rights.

The analysis of the four scenarios of restrictive uses of commercial copies of copyright works that I presented in this chapter lead to the following conclusions and arguments. First, it is more difficult to challenge restrictions of uses imposed by copyright holders on commercial copies of copyright works that are based on their exclusive rights to authorize certain acts under the *CCA*.¹⁸¹ Nevertheless, I developed an argument whereby consumer law (implied) obligations could be invoked to modulate copyright holders' exclusive right to authorize certain acts because of the privileged relationship that they enter into with consumers and the reasonable expectations that result therefrom.¹⁸² This is consistent with consumer law's function to rectify asymmetries that are detrimental to consumers.¹⁸³

¹⁷⁸ For example, standards of availability, consistency and quality in how the signals, streaming or other types of services are delivered. As I discussed in Chapter 9 Part II A, these types of scenarios are not the focus of my thesis as they do not involve issues that are specific to copyright works.

¹⁷⁹ The four scenarios are discussed in Part II to Part V of this chapter and situate the contemplated uses within or outside the exclusive domain of copyright holders and within the reserved uses, based on a contractual authorization of use by copyright holders (or absence thereof) or on uses that are specifically authorized by the *CCA*.

¹⁸⁰ See the discussion on the place of users in copyright law in Chapter 2 Part II and on the operation of exceptions to copyright infringement or so-called users' rights in Chapter 3 Part II.

¹⁸¹ See the discussion in Part II and to a certain Part III of this chapter.

¹⁸² See the discussion in Part II B of this chapter.

¹⁸³ I discuss the theoretical justifications of consumer protection obligations in Chapter 10.

Second, as a corollary to the first conclusion, breaches of consumer law (implied) obligations are more likely to be successful when copyright holders' restrictions of use derive from contractual obligations or TPMs and are outside the scope of their exclusive right to authorize certain acts on their works.¹⁸⁴ Third, I argued that restrictions of uses on acts otherwise permitted by copyright law (as exceptions to copyright infringement) are likely to constitute breaches of implied obligations of quiet possession (and potentially other implied obligations) and unfair commercial practices to the extent that they are not consistent with copyright law.¹⁸⁵ The argument stands on firmer grounds if the exceptions to copyright infringement are qualified as users' rights and if they are mandatory than if they are defences to copyright infringement and are not mandatory.¹⁸⁶ Fourth, I argued that copyright holders' restrictions on acts otherwise permitted by copyright law constitute material information that should be disclosed to consumers and that failure to do so constitutes a breach of information disclosure requirements and could constitute an unfair commercial practice.¹⁸⁷ Fifth, I underscored the need to expand consumer implied obligations to services and the need to distinguish clearly between commercial transactions that involve the transfer of commercial copies of copyright works and the transactions that involve services or a combination of the two, and how the four scenarios that I investigated in this chapter will be impacted by these distinctions.¹⁸⁸

From these conclusions, a sharper image arises on the complementary role that consumer law can play in ascertaining consumers' rights to commercial copies of copyright works and, more importantly, how the substantive allocation of rights, powers, and privileges in copyright law influences the function of consumer law to a large extent. I argued that the rights that the *CCA* grants to copyright holders and the manner by which it restricts them are determinant on the extent to which consumer law can respond to consumer claims against restrictive uses. For instance, courts will be more likely to support copyright holders' restrictive terms of use by giving prominence to the exclusive rights upon which copyright holders rely. The underlying premise is that exclusive rights conferred by law on copyright holders should play an important role in what consumers can reasonably expect. Also, consumers are more likely to successfully claim that restrictions of uses otherwise permitted by

¹⁸⁴ This is the case of the scenario discussed in Part V of this chapter.

¹⁸⁵ See the discussion in Part IV of this chapter.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ See the discussion in Part VI of this chapter.

copyright law breach consumer (implied) obligations if those permitted acts (or exceptions to copyright infringement) are rights and if they are mandatory.¹⁸⁹

The application of consumer law to the four scenarios involving commercial copies of copyright works that I discussed here reveals that consumer law plays a supporting role for copyright consumers' reasonable expectations of quality, fitness for purpose, quiet possession, and fair commercial transactions *as they derive, inter alia*, from copyright law, more than as a corrective function to any imbalance or frustration *resulting from* copyright law itself. While consumer law's main justification is to rectify asymmetries that may impair the meeting of consumers' reasonable expectations, this rectification is justified when the asymmetry and restrictions of use result from copyright holders' commercial practices. The need for rectification is less justified when the asymmetry and restrictions of use directly derive from the exclusive rights conferred by copyright law.

To posit restrictions of uses of commercial copies of copyright works as giving rise to potential breaches of implied obligations of quality, fitness for purpose, title, and quiet possession or unfair commercial practices, opens up the possibility of ascertaining consumers' rights to commercial copies of copyright works in a manner that has yet to be more fully explored. Based on the arguments that I developed in this chapter, the potential of consumer law is likely to be even greater once structural issues on the scope of copyright holders' and users' rights are addressed at the foundational copyright level. In this chapter, I built a path for how consumer protection law can help ascertain the scope of use of commercial copies of copyright works, while pointing to structural deficiencies along the way. In the next chapter, I explore how a more coherent legal framework can strengthen this path even further.

¹⁸⁹ I.e., consumers' reasonable expectations of permitted uses will be greater if they are mandatory rights under copyright law than if they are non-mandatory defences to copyright infringement.

Chapter 12

The Renovation Project: A Hospitable Home for Copyright Consumers

I. Introduction

How can property and consumer law and theory help define and substantiate consumers' rights to commercial copies of copyright works? This is the central question that I explored through out my thesis. The hypothesis that animated my research work is that the articulation and substantiation of a positive right to commercial copies of copyright works is an essential means by which to resolve increasing conundrums and regulatory incoherence resulting from competing interests in commercial copies of copyright works. In this chapter, I apply the metaphor of the house renovation to underscore the property theory foundations of my thesis, as well as to propose a structural framework that stems from the research and analysis conducted in my thesis. The house renovation metaphor is also conducive to making the copyright house more hospitable to copyright consumers.

In Part II of this chapter, I present how, through the various findings of my research, an already furtive image of consumers' personal property rights to commercial copies of copyright works is progressively effacing itself. I highlight the structural root causes that explain why rights to commercial copies of copyright works increasingly evade us at the peril of a coherent and credible copyright system. The progressive drift away of consumers' personal property rights to commercial copies of copyright works justifies the need for a principled approach to ground copyright consumers' rights. In Part III, I present the structural framework by which consumers' rights need to be substantiated. In Part IV, I propose guiding principles and formulate the legal shape that a personal purpose right could take. In Part V, I look at three outcomes that will result from the solidification of consumers' rights to commercial copies of copyright works: *c'est à dire*, an invigorated application of consumer law to commercial transactions involving copyright works, a more robust articulation of the copyright holder end-user relationship, and a finer balance within copyright law.

II. The copyright house evaluation report: structural defects and inhospitable home for consumers

Copyright law is, paradoxically, increasingly inhospitable to copyright consumers. On the one hand, Canada may perhaps be perceived as one of the flagships of copyright users' rights given the recent jurisprudence of the Supreme Court and in particular *CCH Canadian Ltd. v Law Society of Upper Canada* [CCH],¹ where the Court unanimously declared that exceptions to copyright infringement are users' rights.² Also, recent amendments to Canada's *Copyright Act* [CCA]³ brought on four new user provisions that substantiate more explicitly than ever before the permitted scope of individuals' uses of copies of copyright works.⁴ On the other hand, an examination of how the CCA constructs consumers' rights to commercial copies of copyright work reveals another story, as summarized below.⁵ The sobering property law and theory account of rights to commercial copies of copyright works does not make the story more cheerful, but has the merit of underscoring why and how consumers' personal property rights to commercial copies of copyright work need to be strengthened. For its part, consumer law could offer a legal base to copyright consumers who wish to enforce their rights against copyright holders' rights, but cannot play its remedial function fully until certain issues affecting the nature of copyright consumers' rights are addressed at the constitutive property level. In this part, I will summarize the main structural defects that need to be addressed, as observed in the CCA, through property law and theory, as well as in consumer law and theory.

A. Structural defects in the CCA

There are two facets of consumers' rights that are relevant to the present discussion. The first one addresses the status of exceptions to copyright infringement, or the so-called users' rights that I

¹ 2004 SCC 13.

² *Ibid*, at para 48, as subsequently reaffirmed by the Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 [Bell Canada], in *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37 [Alberta] (see the discussion in Chapter 3 Part II C) and in *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68.

³ RSC 1985, c. C-42.

⁴ Canada's *Copyright Modernization Act*, S.C. 2012, c. 20 [CCMA] amended the CCA, *supra* note 3, by introducing s 29.21 "Non-commercial user-generated content", s 29.22 "Reproduction for Private Purposes", s.29.23 "Fixing Signals and Recording Programs for later Listening or Viewing", s 29.24 "Backup copies": see the discussion in Chapter 3 Part II D.

⁵ See the discussion in Part II A of this chapter.

discuss here.⁶ The second one concerns the nature and scope of rights in embodiments of copies of copyright works, something on which the *CCA* is silent and which I discuss below in this chapter.⁷

After having reviewed how the *CCA* constructs consumers' rights to use copyright works, including how the so-called users' rights interact with copyright holders' freedom of contract and use of technological protection measures [TPMs], I concluded in Chapter 3 that copyright law has little regard for copyright consumers' rights. Many of the permitted uses of copyright works without copyright holders' consent are not of particular relevance to consumers.⁸ Recent amendments to the *CCA*, adding education, parody, or satire to the purposes of fair dealing, and introducing the four new user provisions, are short-changed to be able to improve matters effectively for consumers.⁹ While the recent amendments to the fair dealing provisions and the Supreme Court jurisprudence on fair dealing indicate a greater recognition of the interests that compete with the exclusive rights of copyright holders (e.g., the interests of users, the public interest), the fair dealing doctrine is ill adapted to address the needs of copyright consumers.¹⁰ It is true that the introduction of the four new user provisions shows an unprecedented attempt to address specific needs of copyright consumers. However, the four new user provisions are piecemeal and are subject to many caveats.¹¹ While the *CCA* now specifically provides for an exclusive distribution right and its exhaustion after the first transfer of the copies of the copyright works were authorized by the copyright holders, I discussed how copyright holders' commercial practices circumvent that rule and how the prevailing view is that exhaustion does not apply to copies of copyright works distributed online with no embedding physical object.¹² Finally, the status of freedoms and privileges that have been traditionally considered outside the purview of the exclusive rights of copyright holders, i.e., the unlimited power and privilege to play, read, view and listen to copies of copyright works is threatened in the digital environment.¹³

⁶ See the discussion in Chapter 3 Part II and Part IV.

⁷ See the discussion in Part IV B (ii) and in Part IV C of this chapter. See also the discussion on the nature of commercial copies of copyright works in Chapter 6 Part II.

⁸ For instance, I discussed in Chapter 3 Part II A, B and C why the non-substantial part doctrine, the private copying regime and fair dealing were not particularly useful user rights for consumers.

⁹ *CCMA*, *supra* note 4, amended the *CCA*, *supra* note 3, s 29, and added ss 29.21-29.24.

¹⁰ See the discussion in Chapter 3 Part II C.

¹¹ See the discussion in Chapter 3 Part II D.

¹² See the discussion in Chapter 3 Part II F.

¹³ See the introductory comments in Chapter 3 Part II.

The legal landscape of copyright consumers is a maze: the paths of users' rights include many dead ends. What Parliament created and gave to consumers, it also gave explicit permission to copyright holders to take back from them, or turned its head away from copyright holders' ability to do so. Of the four new user provisions, three can be explicitly overridden by TPMs.¹⁴ This highly compromises their status as rights and makes it less likely that the new user rights are mandatory.¹⁵ As to other exceptions to copyright infringement, their nature and scope as rights is debatable and so is their mandatory nature.¹⁶

The constraints that the *CCA* permits, or does not disallow, on users' rights, lead one to question the true nature and scope of those rights, and to reflect on the effects of this uncertainty. In addition to leaving consumers in an undesirable state of legal uncertainty and exposing them to increased risk of litigation, the permitted constraints to users' rights dictate to a large extent how copyright holders and intermediaries develop their business models and their offerings to consumers.¹⁷ In light of how the *CCA* constructs copyright consumers' rights, the question becomes whether we can provide a simpler floor plan to copyright consumers and, if so, on what legal and normative base?

B. Consumers' rights in commercial copies of copyright works: the property law and theory evaluation

In the Second Part of my thesis, I looked at how property law and theory explicate the peculiar nature of copyright and of commercial copies of copyright works as two distinct forms of personal property and how they provide the theoretical justifications and normative framework to substantiate copyright consumers' rights thereto.¹⁸ I also argued that property law and theory embed tools to mediate between copyright holders and consumer rights as they relate to copyright works. In this Part, I summarize the six main insights gained from the application of property law and theory to copyright and to copy ownership.

¹⁴ See the discussion in Chapter 3 Part II D.

¹⁵ See the discussion in Chapter 3 Part IV.

¹⁶ *Ibid.*

¹⁷ See the concluding remarks in Chapter 3 Part IV.

¹⁸ I.e., "The Application of Property Law and Theory to Copyright and Commercial Copies of Copyright Works" (Chapter 4 to Chapter 7).

The first insight that can be derived from the application of property law and theory to copy ownership and copyright is that copyright is a limited-in-scope proprietary interest to begin with and that, as for any other proprietary interest, it is not absolute; it can always be subject to limitations, which are widespread in modern legal systems.¹⁹ As the scope of ownership rights in commercial copies of copyright works is increasingly subject to important limitations through copyright, the scope of the ownership interest of copyright holders is progressively expanding, taking a reverse course.²⁰ The recent expansion of copyright may be attributable in part to an erroneous understanding of the nature of property, but not as a result of acknowledging the property nature of copyright.

The second insight that can be derived from the application of property law and theory to copy ownership and copyright comes from selected theoretical justifications of property and copyright, which lead to the following observations: (i) that there is a *prima facie* normative status of all ownership freedoms quite independent from instrumental considerations that tend to be stronger in the case of personal property than real property.²¹ Property by nature allows countless acts that are exercises of freedom and autonomy; without the ability to exercise freedom and autonomy, those innumerable acts would be potentially open to constant suspicion and ultimately subject to state scrutiny;²² and (ii) that the prevailing instrumental justification of copyright, i.e., to incent and reward creativity and the dissemination of works also needs to apply to copy owners.²³ Failure to promote the interests of copy owners through those objectives is an inherent contradiction that can lead the evolution of copyright to turn against its stated instrumental justifications.²⁴

The third insight that can be derived from the application of property law and theory to copy ownership and, in particular, its nature and justification, is to take copyright away from isolationist or *sui generis* analyses and to bring copyright within the broader framework of property institutions and how they co-exist with other legal regimes, e.g., contracts. While we could previously bear the minimalist articulation of personal property rights in commercial copies of copyright works as we

¹⁹ See the discussion on the limitations to property in Chapter 4 Part V.

²⁰ I discuss the progressive expansion of copyright holders' exclusive rights in Chapter 5 Part II.

²¹ See the discussion in Chapter 6 Part III A.

²² *Ibid.*

²³ See the discussion in Chapter 6 Part III B.

²⁴ *Ibid.*

have traditionally known them up until now,²⁵ recent technological evolutions, the *prima facie* normative status of ownership freedoms, and the commonly invoked instrumental justifications of copyright show us that this is no longer viable. The lack of attention to and understanding of the scope and normative goals embedded within copy ownership is one of the possible root causes that have allowed the progressive expansion of copyright holders' exclusive rights.²⁶

The fourth insight that can be derived from a property law and theory analysis to copy ownership and copyright is that it underscores the existence of two competing property rights in the same object, i.e., the copyright work.²⁷ The acknowledgment of two competing property rights reinforces the place of copy owners: it levels the field for copyright and copy owners, as it becomes harder to justify a double standard to two co-existing property rights.²⁸ The personal property foundation of copyright consumers' rights provides a stronger base to argue for consumer and other user rights to commercial copies of copyright works than broad public interest policy arguments that are nevertheless complementary to ascertaining stronger consumers' rights to commercial copies of copyright works.²⁹

The fifth insight that can be derived from a property law and theory analysis to copy ownership and copyright is that the application of the theory of property limitations situates personal property in commercial copies of copyright works as a distinct property – limitation rule of copyright holders' exclusive rights. The theory of property limitations provides a framework to articulate when and why copy ownership should act as a justifiable property limitation to copyright, and vice versa. It underscores how and when an unbridled expansion of copyright at the expense of copy owners' proprietary interests takes copyright out of its property-specific justice reasons.³⁰

The sixth insight that can be derived from a property law and theory analysis to copy ownership and copyright is that the *numerus clausus* principle, under which the list of property interests that exist is closed and cannot be tampered with through contract, can be a useful norm of judicial self-

²⁵ i.e. the common view was that copy owners of copyright works could enjoy the work (read, listen, play) for an indefinite period and without limitations and could lend and transfer the work at their entire discretion, without any duty to account to anyone.

²⁶ I discuss the progressive expansion of copyright in Chapter 5 Part II.

²⁷ I discuss the interaction between these two competing ownership rights in Chapter 7.

²⁸ *Ibid.*

²⁹ The policy arguments put forward to support a greater recognition of the place of users in copyright law are discussed in Chapter 2 in particular in Part II and Part V, and in Chapter 6 Part III B.

³⁰ See the discussion in Chapter 7 in particular in Part III.

governance³¹ to secure copyright consumers' rights to copy ownership and counter copyright holders' commercial practices that in effect denature the personal property of copyright consumers into an unknown form of proprietary interest.³²

To sum up, the property law and theory analysis that I presented in the Second Part of my thesis underscored how the ownership of commercial copies of copyright works is progressively denatured and in need of urgent reinforcement. The property law and theory analysis has provided a framework to identify and explain some of the defects of the copyright house, the legal and normative base for strengthening the scope of ownership rights in commercial copies of copyright works, as well as flexible and adaptable tools to mediate between the competing rights and interests of copyright holders and consumers.

C. Rippling effects of structural defects

In the Third Part of my thesis, I looked at how consumer law and theory can further help substantiate copy owners' rights to commercial copies of copyright works.³³ I summarize here the four main insights gained from the application of consumer law and theory to copyright consumers.

The first and main insight that can be derived from the application of consumer law and theory to copyright consumers is that consumer protection law cannot play its remedial function if the root cause of the consumers' dissatisfaction occurs at the structural property level of consumers' rights in commercial copies of copyright works. In other words, consumer law and theory cannot rectify structural deficiencies that are determined or allowed by the scope of the personal property of copyright holders and of copyright consumers. The reason why I arrive at this conclusion is that the relevant areas of consumer protection law for my study support consumers' reasonable expectations by, *inter alia*, filling the gaps occasioned by the contested consumer transaction to confirm the open-

³¹ Thomas Merrill & Henry Smith, "Optimal Standardization in the Law of Property: the Numerus Clausus Principle" (2000) 110 Yale L.J. 1 at 11. See also the discussion on the standardization of property in Chapter 4 Part III.

³² I apply the *numerus clausus* principle to commercial copies of copyright works in Chapter 7 Part IV and I discuss the principle in Chapter 4 Part III, Chapter 5 Part IV C and Chapter 6 Part II.

³³ I.e.: The Application of Consumer Law and Theory to Commercial Copies of Copyright Works (Chapters 8 to 11).

ended powers and privileges that they are entitled to as personal property owners.³⁴ One example is the suppliers' implied obligation to guarantee the quiet possession of the goods they sell to consumers.³⁵ Because courts are more likely to defer to the law of property (in our case, personal property law and copyright) to evaluate what consumers' reasonable expectations should be with respect to the scope of use of commercial copies of copyright works, the effect of consumer protection law in this particular context is better described as a supportive function, rather than a curative one. If consumers are dissatisfied with the scope of permitted use of commercial copies of copyright works, but this scope is legitimate under current copyright law, it is unlikely that consumer protection law can come to the rescue of consumers.³⁶

The second important insight that can be derived from the application of consumer law and theory follows the same logic on the supporting rather than curative function of consumer law on the proprietary interests of copyright holders and copyright consumers as they derive from the *CCA* and personal property law. If exceptions to copyright holders' exclusive rights (e.g., fair dealing, the private copying regime, or the four new user provisions) are privileges and not rights (or if their status as rights is not clear under a copyright law analysis) it is unlikely that consumer law can come to the rescue of consumers and provide them with remedies that would allow them to exercise those privileges against copyright holders. This is very apparent from the French cases *Warner Music*³⁷ and *Mulholland Drive*.³⁸ Conversely, if the exceptions to copyright holders' exclusive rights are rights, consumer protection law can play an important complementary role in providing remedies to consumers who are deprived of their rights to specific usages of commercial copies of copyright works.

The third insight that can be derived from the application of consumer law and theory to copyright consumers' rights is that the remedies available under consumer law can redress the asymmetry that

³⁴ I.e. implied obligations of fitness for purpose, quality, quiet possession, title, as well as information disclosure requirements and prohibitions of unfair practices. See the discussion in Chapter 9 Part II and in Chapter 10 Part V.

³⁵ See the discussion on the scope and application of the implied obligation of quiet possession in Chapter 9 Part II C and on the theoretical justifications for this implied obligation in Chapter 10.

³⁶ See the discussion in Chapter 11.

³⁷ Trib. gr. inst. 5^e Paris, 10 January 2006, *Christophe R., UFC Que Choisir / Warner Music France, Fnac*, (2006) JurisData: 2006-292685. See the discussion on the *Warner Music* case in Chapter 3 Part IV A.

³⁸ CA, Paris, 4 April 2007, *Studio Canal et al. v S. Perquin and Union fédérale des consommateurs Que choisir*, Gaz. Pal. 18/07/2007 N° 199, 23; confirmed by the Cour de Cassation: Cass civ 1st, 19 juin 2008 (2008) Bull civ, I, N° 177. See the discussion on the *Mulholland Drive* case in Chapter 3 Part IV A.

subsists between copyright holder distributors and consumers if the usage restrictions result from copyright holders' freedom to commercially exploit their exclusive rights by contract but do not involve acts that are exclusively reserved to copyright holders.³⁹ Consumer law can play the same remedial role with respect to usage restrictions that are imposed by copyright holders but are outside the scope of their exclusive rights.⁴⁰ Consumer protection law can also play a role in protecting copyright consumers when important information regarding copyright holders' exclusive rights is not adequately supplied to them.⁴¹

The fourth insight that can be derived from my analysis of the role that consumer protection law can play in substantiating consumers' rights to commercial copies of copyright works is that a narrow application of the concept of tangibility limits what qualifies as "goods," which in turn can preclude the applicability of consumer law implied obligations.⁴² This is particularly relevant with respect to digital commercial copies of copyright works that are increasingly distributed online with no hand-to-hand exchange of a supporting medium. Their status under statutory consumer protection law is less than certain, which brings another layer of complexity as to whether copyright consumers can successfully make statutory consumer protection claims against copyright holders.

The analysis conducted in the Third Part of my thesis reveals that consumer law could play an important supporting role in ascertaining copyright consumers' rights to commercial copies of copyright works. As a result of the structural deficiencies of copyright and copy ownership that I identified by the analysis that I presented in the First Part and in the Second Part of my thesis, the supporting function of consumer law remains limited for the time being. To be sure, the increasingly anaemic and malleable scope of the ownership interests in commercial copies of copyright works identified at the property level are carried over at the consumer protection law level, undermining consumer protection law remedial functions to the detriment of copyright consumers.

While our laws have progressively secured greater protection for copyright holders in order to address the new exigencies of the digital environment, they have been slow at fully taking into account the

³⁹ See the discussion in Chapter 11 Part V.

⁴⁰ *Ibid.*

⁴¹ I refer here to the remedies available to consumers in case of breach by copyright holders of their information disclosure requirements in consumer law: see the discussion in Chapter 9 Part IV and in Chapter 11.

⁴² See the discussion in Chapter 8 and in particular Part II.

rights and interests of copyright consumers, thereby creating a legal framework that is increasingly and unjustifiably inhospitable to them. The shrinking scope of the ownership interests in commercial copies of copyright works, the unclear nature of so-called users' rights under the *CCA*, and as a rippling effect, the less efficient role of consumer protection law to support consumers' claims, contrast sharply with the theoretical justifications and normative framework that point toward embracing more fully the role of lawful copyright consumers as part of the objectives pursued within the copyright house.

The structural problems at the property level of copy ownership and copyright, as well as the negative rippling effects they have on the efficacious protection of copyright consumers under consumer law, as both have been summarized here, dictate to a large extent the framework and substance of the recommendations to which I devote the remainder of this chapter.

III. The building blocks of a robust and hospitable home for copyright consumers

The future of copyright relies in part on bringing consumers in the copyright house as coveted residents, for copyright to retain its credibility and legitimacy. In this part, I propose five guiding principles by which copyright consumers' rights to commercial copies need to be substantiated to create a much more hospitable and coherent legal framework. The first proposal is that the cloud of uncertainty that subsists between the status and proper treatment of the competing interests between copyright holders and copy owners can only be effectively resolved at the inception (property/copyright) level. The second proposal is that the ambiguity about whether copyright consumers have rights or privileges to commercial copies of copyright works needs to be resolved in favour of rights or at a minimum, mandatory exceptions. The third proposal is that the concept of tangibility needs to be substantially renovated. The fourth proposal is that we need to take the distinction between goods and services seriously. The fifth proposal is that copyright holders' freedom of contract needs to be steered toward the broader objectives of copyright and of the property institution.

A. The foundations: property

The foundational role of the property institution in allocating entitlements to resources needs to manifest itself at two distinct levels. First, I will propose that the substantiation and articulation of copyright consumers' rights to commercial copies of copyright works need to occur at the level of the inception of copyright, i.e., the *CCA* or similar constitutive acts. Second, I will argue that the foundational structure of property rights conferred on copyright holders by the *CCA* should also include limits on how copyright holders devise their exclusive rights.

First, regarding the most efficient location to articulate copyright consumers' rights, commentators who have looked at the vulnerabilities of copyright consumers and how they are treated in copyright and in consumer law propose that legal reform should occur at the consumer and contract law level.⁴³ Other commentators propose that effective reform should take place at the copyright level, or both at the consumer contract and copyright law level, or within a general framework of information policy.⁴⁴

Commentators who advocate a consumer contract law approach as the better means to address the interests of copyright consumers point to the copyright-holder-centric nature of copyright law

⁴³ Natali Helberger & P. Bernt Hugenholtz, "No place like home for making a copy, private copying in European copyright law and consumer law" (2007) 22 Berkeley Tech. L.J. 1061 at 1078-1097, in particular at 1096- 1097; Peter Rott, "Download of Copyright-Protected Internet Content and the Role of (Consumer) Contract Law" (2008) 31 J. Consum. Policy 441 at 455, on the treatment of an i-consumer contract law: "The right place for such an i-consumer contract law is not copyright law. Consumers' affordable access to content and their right to a fair deal lies somewhere in between copyright law and classical consumer contract law. In essence, it is not only the protection of the author that is at stake but the balancing of the commercial interests of the content providers with the interests of the end users." See also Joris van Hoboken & Natali Helberger, "Looking Ahead—Future Issues when Reflecting on the Place of the iConsumer in Consumer Law and Copyright Law" (2008) 31 Journal of Consumer Policy, 489-96, where the authors introduced papers presented at a symposium on consumers and copyright and digital content and argue that the best area of law to address e-consumer concerns is in consumer law.

⁴⁴ Thomas Dreier, "Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?" in Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First eds., *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001) 295 at 311-314 views copyright law as the better framework to address interests competing with the exclusive rights of copyright holders; see also Jens Schovsbo, "Integrating Consumer rights into Copyright law: From the European Perspective" (2008) 31 J Cons Policy 393, at 403ff; Niva Elkin-Koren, "Making Room for Consumers Under the DMCA" (2007) 22 Berkley Technology Law Journal, 1119 at 1131-1132 argues that issues around copyright consumers need to be addressed beyond consumer protection laws, at the broader information policy level; Lucie Guibault, "Accommodating the Needs of iConsumers: Making Sure They Get Their Money's Worth of Digital Entertainment" (2008) 31 J Consum Policy 409 at 417ff. looks at solutions to address copyright consumers' interest within copyright law and consumer contract law.

opposing the property rights of copyright holders against narrowly defined privileges or exceptions.⁴⁵ Other commentators doubt that consumer law is able to address consumers of information products' interests because consumer law doctrine is too narrow and focuses on the economic aspects of consumption.⁴⁶ For Niva Elkin-Koren, consumer law requires a baseline of "consumer expectation[s]" that is hard to define and that the determination of such expectations is largely dependant on contracts and, in a copyright context, on the liberties of right holders.⁴⁷ The interests of consumers of information products need to be tackled at a broader information policy level.⁴⁸

Commentators who advocate that the needs of copyright consumers can be better addressed within copyright constitutive statutes rely on a broader perspective of copyright law that should promote public interest policy goals and not just be concerned with the protection of copyright holders' rights.⁴⁹ Thomas Dreier argues that addressing copyright users and broader public interests within copyright law itself offers a more user-friendly, transparent, and tailor-made approach than under other legal frameworks.⁵⁰ For instance, setting limitations to how copyright holders exploit their exclusive rights through contract only concerns copyright that needs not be addressed in broader consumer or contract legislations.⁵¹ Other propositions include increasing copyright limitations within copyright constitutive acts to better balance the interests between copyright holders and consumers.⁵²

As I have explained above in this chapter, my research on the application of consumer law to commercial copies of copyright law leads me to conclude that deficiencies regarding the interests of copyright consumers need first be addressed at the property or constitutive copyright level.⁵³ No reform at the consumer law level can meaningfully improve the protection of copyright consumers without first addressing the property structural issues and incongruence identified in the First Part and

⁴⁵ See for example, Helberger & Hugenholtz, *supra* note 43 at 1096-1097: "...even a copyright system that does consider certain consumer interests will always fall short of fulfilling the real needs of information consumers. In Europe, copyright is chiefly designed as a property right, as are its structure and its discourse. Exclusive rights are the rule, while freedoms are framed as "exceptions" that must be narrowly construed, especially in the author's rights tradition. Due to copyright law's systemic pro-right-holder bias, as reflected in the property model, achieving a proper balance between protecting the interests of copyright holders and the interests of users will always be an uphill struggle for consumer groups."

⁴⁶ Elkin-Koren, *supra* note 44 at 1121.

⁴⁷ *Ibid* at 1130-1131.

⁴⁸ *Ibid* at 1131-1132.

⁴⁹ See for example, Dreier, *supra* note 44, in particular at 311-314; Schovsbo, *supra* note 44 at 403ff.

⁵⁰ Dreier, *supra* note 44 at 311.

⁵¹ *Ibid* at 314.

⁵² Schovsbo, *supra* note 44 at 403ff; Dreier, *supra* note 44 at 312-313.

⁵³ See the discussion in Part II A and C of this chapter.

in the Second Part of my thesis.⁵⁴ Consumer law supports consumers' expectations with respect to, *inter alia*, things they own, including commercial copies of copyright works. The applicable tests, including consumers' reasonable expectations, will tend to defer to the property regime that gives rise to contentious rights and their limitations.⁵⁵ As a result, the propositions for legal reform that I present here predominantly seek to transform the copyright holder centrality of copyright constitutive acts, e.g., the *CCA*,⁵⁶ by advancing copyright consumers and other users' interests closer to the forefront. The proposed changes are less foreign to the *CCA* framework than it may first appear. The *CCA* refers to diverse groups of copyright users through the exceptions to copyright infringement that it enumerates.⁵⁷ Also, the *CCA* acknowledges the inevitable interactions between the property interests that it creates and their commercial exploitation.⁵⁸ In parallel, interpretative tools in the field of contract, consumer law, or tools that more generally concern the judiciary, supplement the copyright legal reform that I propose here.⁵⁹

Second, the foundational structure of property should manifest itself through the application of the *numerus clausus* principle under which the list of property interests is closed, as a legal interpretation tool that should guide the judiciary when interpreting the commercial agreements under which copyright holders make their works available.⁶⁰ While it is a prerogative of copyright holders to decide how, when, and to whom they authorize acts that are within their exclusive domain,⁶¹ copyright holders' powers and privileges should not denature the personal property of lawful copyright consumers who acquire commercial copies of their works, by creating unknown property interests.⁶² More specifically, copyright holder contractual restrictions on consumers' ability to transfer the copies of copyright works that they lawfully acquire should be interpreted in accordance with the *numerus clausus* principle.⁶³ The application of the *numerus clausus* principle is also conducive to maintaining the integrity of exhaustion or the first sale doctrine that serves a balancing

⁵⁴ See the discussion in Part II A and B of this chapter where I summarize the main areas of contention that need to be addressed for the more coherent articulation of copyright consumers' rights.

⁵⁵ See the discussion in Chapter 10 and Chapter 11.

⁵⁶ This is the case with respect to the guiding principles that I propose to follow in Part III B, E and to some extent C, and in Part IV of this chapter.

⁵⁷ *CCA*, *supra* note 3, ss 29-33.

⁵⁸ *CCA*, *supra* note 3, ss 13(3)-13(7).

⁵⁹ This is the case with respect to the guiding principles that I propose to follow in Part III C and D of this chapter.

⁶⁰ See the discussion on the *numerus clausus* principle in Chapter 4 Part III and in Chapter 7 Part IV.

⁶¹ See the discussion in the introductory comments of Chapter 3 Part III.

⁶² See the discussion on the *numerus clausus* principle in Chapter 4 Part III and in Chapter 7 Part IV.

⁶³ See the discussion in Chapter 7 Part IV.

function of competing interests within copyright law.⁶⁴ In addition to preserving the efficiencies that withstand it, the *numerus clausus* principle secures more robust powers and privileges of ownership by allowing copyright consumers to retain their right to transfer the copies that they lawfully acquired.

Further consideration should be given to effectively setting boundaries on copyright holders' freedom of contract by incorporating statutory language inspired by the *numerus clausus* principle.⁶⁵ To set limits through statute on copyright holders' freedom of contract in accordance with the *numerus clausus* principle would contrast with jurisdictions that have gone the other way and explicitly endorsed copyright holders commercial practices that limit copyright users' rights to transfer the copies that they lawfully acquired.⁶⁶

As a foundational rule, the level at which copyright consumer interests first need to be considered and addressed is at the copyright constitutive act level. In many ways, the *CCA* and similar copyright statutes in other jurisdictions set the agenda as to how the scope of consumers' and copyright holders' rights are interpreted and lead to rippling effects in other areas of the law. And yet, what justifies conferring greater rights on copyright consumers and, if those rights are justified, what shape or form should they take? These are the question that I explore next.

⁶⁴ I discuss the exhaustion or first sale doctrine in Chapter 3 Part II F, in Chapter 7 Part III A (ii) and in Chapter 8 Part III.

⁶⁵ This could be achieved either within copyright law or consumer protection law. I discuss the possible legal mechanisms to align copyright holders' freedom of contract with the overall objectives of copyright law in Part III E of this Chapter.

⁶⁶ See for example the *Copyright, Design and Patents Act 1988* (UK), c. 48, s. 56 (2) which endorses by implication commercial practices under which copyright holders license copies to copyright works and makes the restrictions apply to subsequent owners:

"If there are no express terms— (a)prohibiting the transfer of the copy by the purchaser, imposing obligations which continue after a transfer, prohibiting the assignment of any licence or terminating any licence on a transfer, or (b)providing for the terms on which a transferee may do the things which the purchaser was permitted to do, anything which the purchaser was allowed to do may also be done without infringement of copyright by a transferee; but any copy, adaptation or copy of an adaptation made by the purchaser which is not also transferred shall be treated as an infringing copy for all purposes after the transfer."

B. The bricks and mortar: consumers' rights or mandatory exceptions to copyright infringement

There are two facets of consumers' rights that deserve clarification and fortification in the *CCA*. The first one addresses the status of exceptions to copyright infringement or the so-called users' rights, which is the aspect of consumers' right that I focus on here.⁶⁷ The second one concerns the scope of the personal property rights of lawful acquirers of commercial copies of copyright works⁶⁸ to which I refer to here and develop further below in this chapter.⁶⁹ While these two aspects of copyright consumers' rights are distinct, they are also interrelated. Exceptions to copyright infringement are, in most cases, not concerned with the status of the user as the personal property owner and, in that sense, are independent of personal property rights in commercial copies of copyright works.⁷⁰ At the same time, exceptions to copyright infringement delineate to some extent the scope of copyright holders' exclusive rights that in turn determine the scope of copyright holders' non-ownership proprietary interest in commercial copies embedding their copyright works.⁷¹ From that perspective, exceptions to copyright infringement and the scope of the personal property rights in commercial copies of copyright works are interrelated.

In Chapter 3, I concluded that while the nature of exceptions to copyright holders' exclusive rights has been characterized as "rights" by *CCH*, their nature and scope remain uncertain, even more so with the recent amendments to the *CCA* that brought on the legal protection of TPMs.⁷² I argued that the legal protection of TPMs effectively institutes a hierarchy of users' rights. The mandatory nature of the so-called rights is also unclear and is subject to various interpretations.⁷³

The uncertainty as to whether exceptions to copyright infringement are rights or privileges may originate from diverging conceptions about the scope of copyright holders' obligations as they make

⁶⁷ See the discussion in Chapter 3 Part II and Part IV.

⁶⁸ See the discussion on the nature of commercial copies of copyright works in Chapter 6 Part II.

⁶⁹ See the discussion in Part IV B (ii) and in Part IV C of this chapter.

⁷⁰ In some cases, the exceptions to copyright infringement apply only to the extent that the user owns the copy of the copyright work: see the discussion in Chapter 6 Part II A.

⁷¹ See the discussion on the nature of copyright holders' non-ownership interest in commercial copies of copyright works in Chapter 5 Part IV B.

⁷² *CCH*, *supra* note 1 at para 48. *CCMA*, *supra* note 4, which amended the *CCA*, *supra* note 3. See the discussion in Chapter 3 Part IV.

⁷³ See the discussion in Chapter 3 Part IV.

their works available to the public. There is, at times, confusion between copyright holders' obligations to make their works (commercially) available to the public (obligations that they do not have) and what copyright holders' obligations should be once they make their works (commercially) available to the public.⁷⁴ The same confusion lingers in debates on the legitimacy of technological protection measures in copyright law.⁷⁵ From the starting point that copyright holders have no obligation to make their works available to the public, the inference is sometimes made that copyright holders have no obligation on *the manner in which* they make their works available to the public. The same lenience that endorses copyright holders' flexibility in how they make their works available to the public is, by extension, reflected in the progressive expansion of copyright holders' exclusive rights at the expense of the personal property rights in commercial copies of copyright works.⁷⁶ The confusion around copyright holders' obligations results more from the degree of flexibility that they enjoy as to how they make their works available than not having any obligation at all with respect to how they make their works available.⁷⁷

Copyright holders do not make their works commercially available in a vacuum. They resort to contracts of sale (or lease) that confer property (and other) rights to others. Those property rights can enter into conflict with copyright holders' own rights and need to be mediated by understanding how they limit one and other. The competing property rights and the contracts of sale are subject to a web of other laws, including consumer protection laws. Copyright cannot operate without these legal institutions, many of which preceded it.

The theoretical justifications of copyright consumers' copy ownership revealed how a lack of substantiation of those rights and their progressive hollowing out is not only damaging to consumers, but also undermines the justifications of copyright at its core, making copyright increasingly counterproductive and dissonant.⁷⁸ The application of consumer law to commercial copies of copyright works revealed how this lack of substantiation and hollowing out of personal property

⁷⁴ For example, see the discussion on whether copyright readers have rights or privileges (or liberties) in Jessica Litman, "Readers' Copyright" (2011) 58 J. Copyright Society of the USA 325 [Litman, "Readers' Copyright"] at 346.

⁷⁵ I discuss the scope and debate that surrounds TPMs in Chapter 3 Part III B.

⁷⁶ See the discussion on the progressive expansion of copyright in Chapter 5 Part II.

⁷⁷ I.e. that producers and suppliers are free to supply goods or not. Once they do, they are subject to laws, regulations, contracts and exposed to liability claims. Copies of copyright works that are commercialized follow a similar path.

⁷⁸ See the discussion in Chapter 6 Part III.

rights in commercial copies and the unclear status of copyright limitations had detrimental rippling effects on the effectiveness of consumer protection law's remedial role.

With respect to how the *CCA* should address the ownership of commercial copies of copyright works, there is no choice between whether copy ownership confers rights or whether it confers privileges. The choice lies in what the proper scope of the ownership rights should be.⁷⁹

With respect to how the *CCA* should address the nature of exceptions to copyright infringement, more particularly the gap between their qualification by the Supreme Court in *CCH* as *rights*⁸⁰ and the ambiguous status of exceptions to copyright infringement as they are laid out in the *CCA*, we need to take a hard look at the obstacles that undermine the *righteous* nature of exceptions to copyright infringement.⁸¹ As courts and legislators seek to strike a proper balance between competing interests directly affected by the scope of copyright, the more consequential and effective manner for exceptions to copyright infringement to balance copyright exclusive rights would be to give way to their status as rights, in line with the jurisprudence of the Supreme Court,⁸² or at a minimum to confer them the status of mandatory exceptions to copyright infringement.⁸³ To take another path would leave the important task of balancing the competing interests of copyright holders and users and broader public interests in the hands of copyright holders.

⁷⁹ See the discussion in Chapter 6 Part II and Part III. See also the discussion in Chapter 7. I discuss how to secure greater protection of the personal property rights to commercial copies of copyright works in Part IV B (ii) and in Part IV C of this chapter.

⁸⁰ *CCH*, *supra* note 1 at para 48, as subsequently reaffirmed by the Supreme Court of Canada in *Bell Canada*, *supra* note 2 and in *Alberta*, *supra* note 2.

⁸¹ See the discussion in Chapter 3 Part IV.

⁸² *Ibid.* As David Vaver, "Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties?" (2007) Case Western L. Rev. 731 [Vaver 2007] at 747 observes, the language of exceptions and limitations that is employed in international treaties (in the specific instance the WIPO Internet treaties) and also in the *CCA* and other domestic laws is pernicious: "It treats what owners can do as rights (with all that word connotes), and what everyone else can do as indulgences, aberrations from some preordained norm, activities to be narrowly construed and not extended. The metaphor language of balance cannot sensibly work from such a starting point: how can rights be balanced against exceptions? The scales already start weighted on one side." See also, Schovsbo, *supra* note 44 at 405- 406 who favours the implementation of formal users' rights within copyright law not mere exceptions.

⁸³ As I discussed in Chapter 3 Part IV, mandatory exceptions to copyright infringement to not confer the basis of legal claims to users but contract terms that limit their exercise (as a privilege) are of no force and effect.

Copyright, as any other form of property, entails responsibilities.⁸⁴ Once copyright holders make their work (commercially) available to the public, they should be obliged to do so in a manner that is consistent with the objectives of copyright and with the broader institution of (personal) property. The counterbalances that exist within copyright law to address various competing interests need ideally to translate into rights that users can invoke to counterweight the exclusive rights of copyright holders. Defined users' rights should not be subject to being set aside unilaterally by copyright holders.

There is nothing exceptional or revolutionary in affirming that copyright users, just as copyright holders, have rights that they should be able to enforce from time to time. Elevating exceptions to copyright infringement in the *CCA* to rights in the spirit of the Supreme Court jurisprudence requires weighing up various considerations. Based on Wesley Hohfeld's theory of rights and correlations,⁸⁵ there are important ramifications to the characterization of copyright consumers' relationship with copyright holders as one conferring rights rather than privileges.

The first implication of exceptions to copyright infringement being user rights rather than privileges is that if consumers are in a position that they cannot exercise an exception to copyright infringement (e.g., a fair dealing of a work or cannot exercise their private copying right under the *CCA*), they can assert a legal claim against copyright holders who have a duty toward copyright users. Should all copyright users be entitled to that right (e.g., inadvertent internet browsers) or only lawful acquirers of commercial copies of copyright works?⁸⁶ Should copyright holders bear the cost of the exercise of users' rights? The effective actualization of users' rights in the *CCA* requires giving due consideration to the legal relationship that users have vis-à-vis the copyright work that they access. At a minimum, these rights should be available to lawful copy owners on the basis of their prima facie open-ended powers and privileges in the commercial copies.

⁸⁴ See the discussion on the nature of property and ownership in Chapter 4, in particular in Part II and Part V. With respect to copyright holders' obligations specifically, see Vaver 2007, *supra* note 82 at 749-750.

⁸⁵ I.e. that someone's right implies that someone has a duty towards it. A privilege is the ability to do something with no correlation from anyone obligated towards it (no right). For example, a defence to copyright infringement would qualify as a privilege, not as a right. See Wesley N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1917) 26 Yale L.J. 710; Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale L.J. 16.

⁸⁶ As I discussed in Chapter 6 Part II A, the exceptions to copyright infringement in the *CCA*, *supra* note 3, do not always discriminate between lawful owners of copies of copyright works and other users.

The second implication of treating exceptions to copyright infringement as users' rights is that the exceptions could only be set aside under a contract by waiver unless the right concerns a matter where the doctrine of *ordre public* would apply.⁸⁷ The justification and effects of users' rights in balancing competing interests within copyright law would dictate that they could not be waived in non-negotiated contracts.⁸⁸ Some commentators argue that users' rights should be subject to express waivers, even in consumer transactions, to avoid consumers paying for rights that they do not need.⁸⁹ The express waiver or similar approaches concede to a predominant *a priori* strong copyright holders' exclusive domain to control any act of copying (hence the private copying treatment as an exception) as opposed to more substantial personal property rights in copies allowing a broad range of acts to be performed in the private sphere.⁹⁰ Borrowing from a consumer protection law approach, users' rights should be mandatory in consumer transactions.⁹¹ At least three reasons should guide the obligatory nature of copyright users' rights in consumer transactions: (i) the various asymmetries that subsist between consumers and copyright holders,⁹² (ii) the function of users' rights within the broader objectives of copyright, and (iii) the notion that certain rights are not for sale.⁹³

⁸⁷ Art 1411 CCQ.

⁸⁸ Guibault, *supra* note 44 at 421 argues in favour of limitations to copyright being made mandatory, but only with respect to non-negotiated agreements. Ian Hargreaves, "Digital Opportunity, a review of intellectual property and growth" 2011, at 51 (para 5.40) in a report that was commissioned by the UK Prime Minister, goes even further by recommending that exceptions to copyright cannot be overridden by contract, without making a distinction between negotiated and non-negotiated contracts. The report supports this position, inter alia through an efficiency argument of providing more legal certainty to users. *Ibid.* See also Marcella Favale, "Fine-tuning European copyright law to strike a balance between the rights of owners and users" (2008) 33 E.L. Rev. 687 at 708 where the author recommends that copyright limitations that are of high public policy interest should be made mandatory by European Union secondary law to favour a greater harmonization amongst member states towards an more balanced approach towards the exclusive rights conferred to copyright holders by copyright law.

⁸⁹ Schovsbo, *supra* note 44 at 406 refers for example to the right to private copying stating that it could be made subject to express waivers to ensure that copyright users would only pay for uses that they actually need.

⁹⁰ See the discussion in Part IV C of this chapter on the proposal for a broad right to use copyright works for personal purposes.

⁹¹ See for example: EC, *Council and Parliament Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs*, [2009] OJ L 111/16 [Directive 2009/24/EC] art 5 (2) (3) as an example of exceptions to copyright infringement that cannot be limited by contract. See also Guibault, *supra* note 44 at 421 who argues in favour of limitations to copyright being made mandatory, but only with respect to non-negotiated agreements. See also Hargreaves, *supra* note 88 at 51 (para 5.40).

⁹² Including asymmetries in bargaining power, information, resources to take legal action etc...see the discussion on consumer protection theory in chapter 10.

⁹³ See the discussion chapter 10 where I discuss the theoretical justifications that withstand the non-enforceability of mandatory arbitration clauses in consumer agreements.

The third implication of treating exceptions to copyright infringement as users' rights is that copyright holders who make their works available with TPMs would have the onus to grant access to users' rights.⁹⁴ Because of the uncertainty in the *CCA* on the interaction between TPMs and exceptions to copyright infringement,⁹⁵ copyright holders' obligations to facilitating the exercise of exceptions to copyright infringement need to be made explicit in the *CCA*.

To sum up, the *CCA* should be free of obstacles that prevent exceptions to copyright to be considered as rights, in accordance with the jurisprudence of the Supreme Court on users' rights.⁹⁶ At a minimum, exceptions to copyright infringement should constitute user privileges that are mandatory. The *CCA* should also explicitly address the nature and effect of lawful ownership of commercial copies of copyright work on the scope of the exclusive rights of copyright holders, which I will discuss below in this chapter.⁹⁷

C. New floor plan: rethinking the division between tangibility and intangibility

In Chapter 8, I discussed how the presence of a physical medium exchanged from hand-to-hand that embeds commercial copies of copyright works is a determinant factor to qualify the whole as goods under sale of goods and consumer law and for the exhaustion of the distribution right to apply in copyright law.⁹⁸ The requirement of a physical object places the increasingly widespread online

⁹⁴ On the obligation to accommodate the exercise of exceptions to copyright infringement with respect to works protected by TPMs see EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society*, [2001] OJ, L167/10 [*Directive 2001/29/EC*], art 6(4): "Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.[...]" See also in France, art L.331-7 CPI, under which the onus is placed on copyright holders employing technological measures to ensure that certain limitations to copyright holders' exclusive rights, including the right to make private copies are preserved. See also Rott, *supra* note 43 at 455; Jerome H. Reichamn, Graeme B. Dinwoodie & Pamela Samuelson, "A reverse notice and takedown regime to enable public interest uses of technically protected copyrighted works" (2007) 2 Berkeley Technology Law Journal 981.

⁹⁵ See the discussion in Chapter 3 Part III B.

⁹⁶ In particular, *CCH*, *supra* note 1.

⁹⁷ See the discussion in Part IV B (ii) and Part IV C of this chapter.

⁹⁸ See the discussion in Chapter 8 Part II and Part III A.

distribution of copies of copyright works in an area of legal uncertainty and raises inconsistencies with respect to their nature and the application of copyright exhaustion. I argued that the requirement of a physical object is misguided and artificial, both to determine whether commercial copies of copyright works are goods in sale of goods/consumer law and for the application of copyright exhaustion.⁹⁹ Both in the case of sale of goods/consumer law and of the application of copyright exhaustion, the artificial requirement of a physical supporting medium exchanged from hand-to-hand potentially leads to the narrowing of copyright users' rights.¹⁰⁰

In light of the common reliance on foundational concepts of property in sale of goods/consumer law and with respect to copyright exhaustion, a more reasoned approach to digital copies of copyright works requires going back to basic principles of property.¹⁰¹ There is a pressing need to rethink the requirement of tangibility, both as a determining factor of the goods-like nature of digital copies of copyright works and for the application of copyright exhaustion. This should be done in two ways: (i) by a broader application of the concept of tangibility, i.e., one that acknowledges that copies distributed online are no less physical than the ones distributed with a supporting medium exchanged hand-to-hand, and (ii) by recognizing that movability, transferability, and identification at the time of the sale should be the determining criteria of goods, not a narrow application of tangibility. At the heart of these criteria lies the concept of ownership that does not need the support of a physical medium to exist, but does require movability, transferability, and identification. By recognizing the *ability to own* commercial copies of copyright works as the determining factor, the artificial distinction between digital copies supported by physical medium exchanged from hand-to-hand and digital copies distributed online disappears when the required elements of ownership are present.

⁹⁹ See the discussion in Chapter 8 Part IV.

¹⁰⁰ *Ibid.* See generally Robert Bradgate, "Consumer rights in digital products," 2010, available online at http://www.google.ca/search?sourceid=navclient&ie=UTF-8&rlz=1T4ADBF_enCA275CA275&q=Bradgate%2c+Consumer+rights+in+digital+products+2010 at 30 on the need for digital products needing the same level of protection as goods under sale of goods laws. See also Marco B.M. Loos, Natali Helberger, Lucie Guibault, Chantal Mak, Lodewijk Pessers, Katalin J. Csere, Bart van der Sloot & Ronan Tigner, "Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts" (2011) University of Amsterdam, Centre for the Study of European Contract Law (CSECL), Institute for Information Law (IViR), Amsterdam Centre for Law and Economics (ACLE), online: http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm, at 172-174.

¹⁰¹ For a discussion on how sale of goods and consumer law, e.g. implied obligations, rely on property law, see Chapter 10, and on how copyright exhaustion or the first sale doctrine can be explained through core principles of property law and theory in Chapter 7 Part III A (ii).

D. Knowledge of the trade: goods v. services and sales v. licences

The determination of what constitutes goods under sale of goods and consumer law and the application of copyright exhaustion or the first sale doctrine are closely related to the distinction between goods and services and between what constitute a sale and a licence.¹⁰² Whether consumers access copyright works through the ownership of goods or as a service also determines which copyright holders' exclusive rights are involved in the transaction. A renovation project geared toward solidifying copyright consumers' rights needs to bring clarity to the dichotomy between goods and services and between sales and licences.¹⁰³

As was the case with the characterization of commercial copies of copyright works as goods, the *capacity to own* needs to be the determinant factor distinguishing between goods and services. In addition to the criteria that should be determinant to qualify a product as a good, i.e., movability, transferability, and identification at the time of the transfer, the faculty of ownership of goods and not of services needs to be emphasized.¹⁰⁴ The quality of movability and separateness that comes with ownership of personal property entails the open-ended autonomous and independent faculty to use and *consume* goods, with no reliance on any external forces or operations, which is not present in the case of services.¹⁰⁵

While the concept of ownership will help in providing a more coherent approach to the distinction between goods and services for a more coherent application of sale of goods, consumer law, and copyright law,¹⁰⁶ the adequate regulation of information products also requires a rethinking of the different levels of protection (e.g., implied obligations of quality, fitness, and quiet possession) that still prevail between goods and services.¹⁰⁷ For instance, the automated and highly standardized level of services related to information products mandate similar levels of protection to those of goods (strict liability v. fault-based liability).

¹⁰² See the discussion in Chapter 8 Part II B and C and in Part IV.

¹⁰³ See the discussion in Chapter 8 Part II B and C and in Part III and Part IV.

¹⁰⁴ See the discussion in Chapter 8 Part II B.

¹⁰⁵ *Ibid.*

¹⁰⁶ In the case of copyright law, the distinction between goods and services is central to the determination of the exclusive rights of copyright holders involved and on the collective administration (including remuneration to copyright holders) thereof: see the discussion in Chapter 8 Part III and Part IV.

¹⁰⁷ I discuss the various levels of protection between goods and services in sale of goods and consumer law in Chapter 8 Part II B.

The coherent application of sale of goods, consumer law, and copyright law also depends on resolving the lingering confusion between licence agreements and sale agreements. Courts rely on the distinction between the two legal transactions to conclude that a product is not a good or that copyright exhaustion does not apply.¹⁰⁸ First, it goes without saying that the presence of a sale is not a condition *sine qua non* for the existence of goods, which can be leased, hired, rented, etc. Second, there is a distinction between the licence to the intellectual property rights of the right holder in the work, rights which are either explicitly or impliedly part of commercial transactions involving copies of copyright works, and the licence or sale *of the copy* of the copyright work.¹⁰⁹ In the latter case, through the application of the *numerus clausus* principle, any commercial transaction that resembles a sale in all material respects should be treated as such, regardless of its definition by copyright holders.¹¹⁰ This is the approach that the European Court of Justice adopted in *UsedSoft GmbH v Oracle International Corp.*,¹¹¹ as well as the one adopted by some courts in the US.¹¹² An interpretative approach that focuses on the essential characteristics of sale and ownership rather than on copyright holders' contractual designs will preserve the integrity of copy ownership, bring copyright law closer to its core objectives, and ensure a better balance between the exclusive rights of copyright holders and the property rights of copy owners.

E. Structural stabilizer: steering freedom of contract toward the objectives of copyright and property

The full actualization of the previous bricks and mortar principles to create an hospitable home for copyright consumers cannot be complete without the alignment of freedom of contract with property and copyright's main objectives.¹¹³ Freedom of contract is a strong value enshrined as a legal principle in modern legal systems. It is precisely because of our strong reliance on freedom of contract and the innumerable ramifications that derive therefrom that a more hospitable home for copyright consumers needs to include some counterweight mechanisms to ensure that the implementation of

¹⁰⁸ See the discussion in Chapter 8 Part II C and in Part III.

¹⁰⁹ See the discussion in Chapter 8 Part II C.

¹¹⁰ See the discussion on the *numerus clausus* principle in Chapter 7 Part V.

¹¹¹ C-128/11, [2012] OJ C 287 at 10.

¹¹² See the discussion in Chapter 8 Part II C and Part III.

¹¹³ I.e., the foundational role of property and the hierarchy of norms that it embeds, equipping consumers with users' rights or at a minimum, mandatory privileges, redefining the division between tangible and intangible, goods v. services and sales v. licences: see the discussion in Part III A, B, C & D of this chapter.

general objectives of our laws are not left at the mercy of the more powerful private interests.¹¹⁴ While there are several legal mechanisms that temper the effects of freedom of contract in consumer protection law,¹¹⁵ copyright holders' powers and privileges as to how copyright holders exploit their works are unconstrained under copyright law, with some limited exceptions.¹¹⁶ In addition to the structural renovations recommended here at the property level that will enable consumer law to more effectively limit copyright holders' freedom of contract,¹¹⁷ statutory interpretative provisions of copyright contracts, in particular end-user agreements, could be brought within the framework of copyright.¹¹⁸ Statutory interpretive provisions of copyright contracts would promote greater consistency between the general objectives and allocation of exclusive rights in the *CCA* and the commercial exploitation of those rights by copyright holders.

¹¹⁴ See Schovsbo, *supra* note 44 at 403, who notes that “To “reclaim copyright” in midst of “privatisation” does not mean that it is to be hostile to contracts” but that there is a need to set up clearer boundaries on how freedom of contract can be exercised. Eduardo M. Penalver & Sonia K. Katyal, *Property Outlaws* (New Haven: Yale University Press, 2010) at 172-182 recommend “against delegation” as a general guiding principle for the regulation of copyright on the basis that copyright holders tend to exaggerate the scope of their rights in standard form agreements. See also Guibault, *supra* note 44 at 415 who discusses how standard form contracts limit legitimate copyright uses and how European directives do not help much in that regard.

¹¹⁵ See the discussion on various legal mechanism of statutory consumer law that limit freedom of contract to protect consumers in Chapter 9 (e.g. the prohibition of unfair commercial practices, the mandatory nature of implied obligations, including of quality, fitness for purpose and quiet possession) as well as their specific application to the commercialisation of copies of copyright works in Chapter 11.

¹¹⁶ For example, see Guibault, *supra* note 44 at 417ff, citing the example of article 95d) of the German Copyright Act, which as a result of the implementation of *Directive 2001/29/EC*, *supra* note 94, now requires that all goods protected by technological measures be marked with clearly visible information about the properties of the technological measures. Guibault also cites examples in Belgian and Portuguese copyright law whereby certain limitations to copyright are mandatory. In France, contracts for the exploitation or assignment of copyright in copyright works by the author are subject to rules that touch upon the form and substance of the contracts. For example, see CPI art L.131-2, L. 131-.3. See generally the discussion on various doctrines setting outer limits to the applicability of contract terms in Chapter 3 Part III A.

¹¹⁷ I.e., when they would go against consumers' reasonable expectations as clarified under copyright law: see the discussion in Part III A of this chapter.

¹¹⁸ For example, an interpretative provision that any clause in non-negotiated agreements that departs from the main objectives of copyright to preserve a balance between the interested parties shall be deemed unfair or any clause that causes a significant imbalance in the parties rights and obligations shall be null and void. See Guibault, *supra* note 44 at 418, who suggests that similar rules could be adopted at the contract law level “to declare any clause in a non-negotiated licence null and void which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the other party. Alternatively, the rule could simply dictate that any contractual clause in a standard-form contract is deemed unfair if it departs from the provisions of the national copyright act.” This could also include interpretative provisions recognizing property rights and supporting the application of the *numerus clausus* principle: see the discussion in Part III A of this chapter.

The foundational role of property and the hierarchy of norms that it embeds, equipping consumers with users' rights or, at a minimum, mandatory privileges, redefining the division between tangible and intangible, goods v. services, and sales v. licences, and steering freedom of contracts toward the objectives of copyright and, more generally, the property institution are the building blocks to define and safeguard copyright consumers' rights to commercial copies of copyright works. In the remainder of this chapter, I will utilize the building blocks to give shape to copyright consumers' rights to commercial copies of copyright works.

IV. The architectural features: the shape of consumers' rights to commercial copies of copyright works

A. Preliminaries

In Chapter 3, I discussed the piecemeal restrictive approach in the *CCA* to permitted acts without copyright holders' authorization, or so-called users' rights, and discussed generally the acts that copyright consumers could perform without copyright holders' authorization.¹¹⁹ I also looked at the interaction between the exceptions to copyright infringement in the *CCA* and copyright holders' commercial practices, including recourse to TPMs. Through a legal and normative approach to the nature of copyright and to ownership in commercial copies of copyright works, I questioned in Chapter 5 and in Chapter 6 the adequacy of the current scope of copyright consumers' rights to commercial copies of copyright works, which in turn raises issues about the coherence and legitimacy of copyright.¹²⁰ I discussed in Chapter 7 how the *prima facie* open-ended powers and privileges of copy ownership need greater recognition as a property-limitation rule of copyright.¹²¹

The nature and number of often unintentional copyright infringements by consumers, and general trends of consumer usage, contain rich sources of information in searching for the legitimate scope of copyright and of rights to commercial copies of copyright works. In *Property Outlaws*,¹²² Eduardo

¹¹⁹ See the discussion in Chapter 3 Part II.

¹²⁰ See the discussion in Chapter 5 and in Chapter 6 Part II and Part III.

¹²¹ See the discussion in Chapter 7 Part III.

¹²² Penalver & Katyal, *supra* note 114.

Penalver and Sonia Katyal look at how property disobedience made property evolve in history.¹²³ They refer, in particular, to the effect of disregard for the interests of “non-owners” within copyright.¹²⁴

Discussions of disobedience ... fail to grasp the complex relationship between disobedience, enforcement, and the overall dynamism and long-term health of the intellectual property system. This tendency is even more damaging in the intellectual property context than it is in the domain of traditional property law because, in contrast to disobedience in the context of tangible property, where boundaries and doctrines are more settled, intellectual property challenges tend to center on the most unsettled areas of technological innovation ... Precisely because the law is so unsettled, the occurrence of unauthorized behaviour signals important information to the courts and legislatures about the purpose, intent and effect of such activities and whether the law should shift to accommodate these interests by instituting forms of compulsory licensing or other means, as it has done in the past.¹²⁵

Penalver and Katyal present a framework for how to assess the significance and effects of various forms of transgressions on property and intellectual property and how in some cases “these transgressions may demonstrate the need for responsible legal shift to update an ossified regime of entitlements or to address the presence of high transaction costs that precluded efficient transfers.”¹²⁶ Paying attention to the messages beneath transgressions, beyond responding with stricter laws, is consistent with a flexible approach that keeps the legitimacy of property institutions in check and counters their inherent stickiness factor.¹²⁷

The recommendations that I present here favour a statutory implementation, rather than a personal property common law approach, that is consistent with a consumer-oriented spirit in relation to

¹²³ *Ibid.*

¹²⁴ *Ibid* at 50.

¹²⁵ *Ibid* at 50-51.

¹²⁶ *Ibid*, at 174. The authors refer to cases of “acquisitive atlaws” which they define as actions that are oriented primarily toward direct appropriation and that are in the grey zone of lawfulness.

¹²⁷ Penalver & Katyal, *supra* note 114 at 45: “[...]intellectual property rights, no less than rights in tangible property, are sticky. Once created, endowment effects, transaction costs, and political inertia combine to keep them in place. In many cases, some free riding may be essential to combat this inertia and force decision makers to consider altering the status quo. Within this dialectic between legal inertia and transgression, the free rider plays an integral role by exposing existing entitlements to a degree of instability and forcing either the parties, the judiciary, or the legislature to at least consider a reallocation of entitlements.” See also David Vaver, *Intellectual Property Law Copyright, Patents, Trade-Marks*, 2d ed. (Toronto: Irwin Law, 2011) [Vaver 2011] at 259, commenting on the lack of empirical evidence justifying the imposition of a levy for private copying under *CCA*, *supra* note 3, ss. 80ff, and yet on the fact that once the right is created, it is difficult to dislocate it, as is common with copyright: “Cyclical declines in record sales continue despite the levy, but the charge obeys a familiar principle of copyright: an owner’s right, once enacted, is never repealed, whether the economic justification for its introduction proves true or false.”

copyright consumers' rights.¹²⁸ My inclination toward legislative reform as the more effective means to effect desirable change is also consistent with the need to repair important structural defects resulting from a copyright-holder-centric system and its rippling effects on other areas of the law.¹²⁹ An instrumentalist view of law as a tool that can effect change is particularly suited to the context in which we need to address copyright users' rights.¹³⁰ Once in place, complementary means of regulation and self-regulation, including voluntary industry codes,¹³¹ and other independent initiatives¹³² can also contribute to reducing the disjunctions and incoherencies between the competing rights and competing legal regimes identified in my thesis.¹³³

It is beyond the scope of this chapter to provide a detailed account of recent proposals for copyright reform that have been made to address the new balances of powers and dynamics in the digital environment. While my remarks focus primarily on how to better implement consumers' rights to commercial copies of copyright works, it is worth mentioning here some of the more fundamental structural reforms that would be compatible with and even enhance the hospitality of copyright law for copyright consumers. Among them, Jessica Litman's proposal to redesign copyright as an

¹²⁸ See the discussion in Chapter 3 Part II, in particular A and C, where I discuss how the current provisions of the CCA do little to address copyright consumers' reasonable expectations with respect to copies of copyright works. Legal doctrines that heavily rely on jurisprudence, such as the non-substantial part doctrine or fair dealing, even with broader interpretation rules, are not the preferred legal framework for their vagueness, difficulty of interpretation and application for consumers.

¹²⁹ See the discussion in Part II C of this chapter.

¹³⁰ More particularly the level at which we need to effect changes concerns corporate copyright holders in the music, film, entertainment and publishing industries and their commercial practices. My personal experience and years of practice of law in a law firm and as corporate counsel, in particular, how companies change their practices to ensure compliance with new laws inform my preference for statutory reform in the present case.

¹³¹ Guibault, *supra* note 44 at 421-422. Self-regulatory industry codes of conducts remain voluntary and are often framed to serve the interests of the industry group. They can still play an important complementary role. In a consumer protection context, see Nicole L'Heureux, *Droit de la consommation*, 5th ed (Cowansville, Qc: Yvon Blais, 2000) at 6.

¹³² As one example, initiatives such as principles for fair commerce in mass-market digital products proposed by Americans for Fair Electronic Commerce Transactions" (AFFECT) as analysed in Jean Braucher, "12 Principles for Fair Commerce in Mass-Market Software and Other Digital Products" in *Consumer Protection in the Age of the "Information Economy"* (Aldershot: Ashgate Publishing Ltd., 2006), available online at: <http://ssrn.com/abstract=730907>.

¹³³ For the various regulatory approaches to consumer transactions in information products in a European context see: Natali Helberger, "Standardizing consumers' expectations in digital content" info, Vol. 13 Iss: 6, 69 - 79. Among the various approaches, the author explores the merit of establishing a "Designated Digital Content Authority."

“exclusive dissemination right for commercial exploitation,”¹³⁴ Lawrence Lessig’s and other scholars’ invitation for the more generous application of liability rules through compulsory licensing,¹³⁵ in particular with respect to file sharing,¹³⁶ are appealing and are worth investigating further. Legislative reform proposals for the preservation of a stronger public domain and greater accessibility to works of the arts and intellect include: the reduction of the term of copyright¹³⁷ and a safe harbour for the use of orphan works.¹³⁸ These proposals are also worth further investigation to the extent that they would have more positive benefits than the status quo for consumers and the public, and enhance the pertinence and coherence of copyright.

Other proposals for legislative reform focus specifically on users’ and consumers’ permitted uses of copyright works. Among them, Jessica Litman’s work defining “lawful personal use” in American copyright law,¹³⁹ Deborah Tussey’s work about the creation of a “privilege of personal use” within copyright law,¹⁴⁰ and work of other commentators¹⁴¹ provide important guidance and frameworks of analysis to give a legal shape to consumers’ rights to commercial copies of copyright works. While Litman and Tussey do not recommend the creation of users’ rights *stricto sensu*, referring to “liberties” and “privileges”, respectively,¹⁴² Jens Schovsbo¹⁴³ refers to the necessity of creating users’ rights, and Lucie Guibault refers to the need to strengthen the application of copyright limitations.¹⁴⁴ The personal use right or privilege is framed around varying combinations of factors, including the purpose of the use,¹⁴⁵ as opposed to acts reserved to copyright holders, and as a further subset,

¹³⁴ Jessica Litman, *Digital Copyright* (Amherst: Prometheus Books 2001) [Litman, “Digital Copyright”] at 171ff; see also Jessica Litman, “Lawful Personal Use” (2007) 85 Tex. L. Rev. 1871 [Litman, “Lawful Personal Use”] at 1911-1912. See also Wendy Gordon, “Harmless Use: Gleaning from Fields of Copyrighted Works,” (2009) 77 *Fordham Law Review* 2411.

¹³⁵ Lawrence Lessig, *The Future of Ideas* (New York: Random House, 2001) at 454-455; Penalver & Katyal, *supra* note 114 at 198, propose compulsory licensing as a means to counter uncontrollable instances of copyright infringement.

¹³⁶ Lessig, *ibid* at 454-455.

¹³⁷ Lessig, *ibid* at 251.

¹³⁸ Penalver & Katyal, *supra* note 114 at 198ff.

¹³⁹ Litman, “Lawful Personal Use”, *supra* note 134.

¹⁴⁰ Deborah Tussey, “From Fan Sites to File sharing: Personal Use in Cyberspace” (2001) 35 Ga. L. Rev. 1129 at 1182ff.

¹⁴¹ Schovsbo, *supra* note 44.

¹⁴² Litman, “Lawful Personal Use”, *supra* note 134; Tussey, *supra* note 140.

¹⁴³ Schovsbo, *supra* note 44 at 405-407.

¹⁴⁴ Guibault, *supra* note 44 at 419ff, where the author explores, in a European context, the effects of rendering statutory limitations to copyright holders’ exclusive rights imperative.

¹⁴⁵ More specifically whether it falls within the goals promoted by copyright law or not, for example, . Litman, “Lawful Personal Use”, *supra* note 134 at 1879 classifies categories of uses based on the degree at

whether the use is consumptive or transformative.¹⁴⁶ The scope of the permitted personal use also involves the ability to share the work with others, e.g., by looking at whether it is a closed circle or an open one through redistribution.¹⁴⁷ Finally, the personal use right or privilege is based on the effect that the uses of copies of the copyright works may have on their commercial exploitation.¹⁴⁸

The various factors to take into account in shaping a personal use right or privilege resonate with the considerations applied to justify the legal protection of private property, in our case copy ownership, as well as its limitations.¹⁴⁹ Applied to the purpose of shaping consumers' rights to commercial copies of copyright works, the factors to consider can be regrouped under two broad headings: (i) the purpose of the use, which includes the character of the use as consumptive or transformative, and (ii) the effect of the use on the commercial exploitation of the work, which includes the considerations of the distinction between closed-circle uses and redistributive uses. I respond to the considerations proposed by the copyright scholars to help delineate consumers' rights or privileges to commercial copies of copyright works by laying out guiding principles that build upon the insights brought by the application of property and consumer law and theory to copy ownership and copyright as summarized above in this chapter.¹⁵⁰

which they promote copyright liberties for users or not i.e. the fact that "copyright law was designed to maximize the opportunities for non-exploitative enjoyment of copyrighted works in order to encourage reading, listening, watching, and their cousins". The author argues that they are "both deeply embedded in copyright's design and crucial to its promotion of the 'Progress of Science.'" Schovsbo, *supra* note 44 at 406-407 classifies two distinct purposes: democratic or information uses, i.e. uses of consumers engaged as citizens and private uses.

¹⁴⁶ For example Tussey, *supra* note 140 at 1136-1138 describes four distinct personal uses, one of the criteria being whether the use is consumptive or adaptive; Schovsbo, *supra* note 44 at 405 includes a specific category of transformative use or user-created content. See also the discussion on the various types of uses by consumers in Chapter 2 Part V. See also Penalver & Katyal, *supra* note 114 at 185: "We believe the law should be mindful of the distinction between free riding for the purposes of innovation and free riding for other purposes, such as consumption and should avoid conflating the two."

¹⁴⁷ Tussey, *supra* note 140 at 1136-1138.

¹⁴⁸ For example, Litman, "Lawful Personal Use", *supra* note 134 at 1911-1912, distinguishes uses that undermine copyright holder's incentive to create from uses that do not.

¹⁴⁹ More particularly, see the discussion in Chapter 6 Part III and in Chapter 7.

¹⁵⁰ I.e. in Part IV C of the present chapter.

B. Guiding Principles

The following principles derive from the findings of my research and offer guidance for the codification of lawful consumers' personal property rights to commercial copies of copyright works in the *CCA*.

(i) Consumer-oriented

A primary concern about the articulation of consumers' rights to commercial copies of copyright works is that they should be easily understood and applied by consumers as their primary intended beneficiaries. Simplicity and clarity, and the use of plain language, should take precedence over vagueness and uncertainty. While a broader and vague drafting approach can bring the benefit of greater adaptability and usually better stands the test of time, simplicity and clarity as well as adaptability are not necessarily mutually exclusive. The adaptability of the statutory provision can be served by its explicit reliance on the regime of personal property, a legal concept that is reasonably well understood and accessible to all. With the same objective in mind, the implementing provision should seek to be technologically neutral. In the same vein, government agency functions that include ongoing opinion statements clarifying acceptable consumer uses of copyright works¹⁵¹ or consumer complaint procedures about restrictive uses¹⁵² could further the goals of improving transparency, accessibility, and predictability of consumers' rights to commercial copies of copyright works.

(ii) Confirming personal property *prima facie* open-ended privileges and powers in commercial copies of copyright works

As I argued above, the non-articulation of the personal property rights of lawful copyright consumers has been one of the facilitators for the progressive expansion of copyright holders' exclusive rights

¹⁵¹ See Hargreaves, *supra* note 88 at 95-96 who proposes giving statutory functions to the UK Intellectual Property Office through the issuance of non-binding "copyright opinions."

¹⁵² UK, Councillor of the Exchequer, *Gowers Review of Intellectual Property*, Andrew Gowers, 2006, online: www.official-documents.gov.uk/document/other/.../0118404830.pdf, at 73, proposes notice of complaint procedures relating to digital rights management tools by providing governmental intellectual property agency web interfaces accessible to the public. The review is an independent study of UK intellectual property law focusing on copyright that was commissioned by the Chancellor of the Exchequer.

and as one result, of the increasing hollowing out of copy ownership.¹⁵³ There needs to be a general presumption that lawful copyright consumers should have the full enjoyment of the copies they own, except as expressly provided otherwise.¹⁵⁴ Lawful copyright consumers should have the *a priori* right to use, copy, display, communicate to the public, perform in public, transform, lend, and transfer their copies of copyright works, subject to copyright holders' exclusive rights acting as property-limitation rules on the ownership of commercial copies of copyright works.¹⁵⁵ The general presumption in favour of lawful copy owners is aligned with the Supreme Court reasons by the majority in *Théberge v Galerie d'Art du Petit Champlain Inc*¹⁵⁶ on the characterization of owners' entitlements to commercial copies of copyright works.¹⁵⁷

The general presumption that lawful copyright consumers shall have the full enjoyment of the copies they own, except as specifically provided otherwise, is consistent with the intrinsic nature and framework of copyright, but not with how the scope of copyright has been interpreted and how it has progressively expanded. As I argued in Chapter 5, copyright holders cannot *own* their works under core principles of property law and theory; their ownership interest pertains to the *bundle of exclusive rights as they relate to the work as materialized*.¹⁵⁸ Inserting a general presumption affirming the *prima facie* open-ended privileges and powers of lawful copy owners would rehabilitate the very essence of copyright and its operating structure, which is a specific list of acts on works that are exclusively reserved to copyright holders.¹⁵⁹ The general presumption in favour of lawful copy owners would counter the erroneous assumption reflected in court decisions and legislative reform that views copyright holders as *owners* of their works, and lead to the progressive expansion of

¹⁵³ See the discussion on the nature of commercial copies of copyright works in Chapter 6 Part II.

¹⁵⁴ I.e., in the *CCA*, *supra* note 3 or similar copyright constitutive acts.

¹⁵⁵ See the discussion in chapter 7 Part II. I discuss how copyright exclusive rights should limit ownership of commercial copies of copyright works in Part IV B (iv) of this chapter.

¹⁵⁶ 2002 SCC 34.

¹⁵⁷ *Ibid*, at paras 31-32 Binnie J. for the majority: "Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it. Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization." See the discussion on the *Théberge* judgment in Chapter 7 Part III A (i).

¹⁵⁸ This results from the separateness between the work protected by copyright and its multiple materializations as they are made available to the public. It is aligned with the objective of copyright to encourage the dissemination of works. As a result, copyright holders' correlative trespassory powers do not forbid uses by others of their works once they are published but only restrict specific acts as enumerated in the *CCA*, *supra* note 3 or similar copyright constitutive statutes: see the discussion in Chapter 5 Part IV A (ii).

¹⁵⁹ See the discussion in Chapter 5 Part IV A (ii).

copyright.¹⁶⁰ By the same token, the presumption in favour of lawful copy owners' rights may help counter the double standard that applies to the ownership interest of copyright holders in contrast to the ownership interest of copyright consumers.¹⁶¹

The general presumption that lawful copyright consumers shall have the full enjoyment of the copies they own, except as specifically provided otherwise, is consistent with a broader application of the concept of copyright exhaustion beyond setting limits on copyright holders' exclusive right of distribution.¹⁶² Under a broader application of the copyright exhaustion doctrine, lawful copy owners are implicitly allowed to perform several acts reserved to copyright holders.¹⁶³ While the entitlements attached to the personal property of copy owners of copyright works may previously have been taken for granted, as the digital environment redefines the rules of engagement and entitlements, including new legitimate expectations by lawful copy owners of copyright works, we need to bring back core principles about *ownership*, with the concepts of *goods* and *sales* to the fore, for the sake of the integrity and credibility of our legal system.

The presumption in favour of lawful copy owners is subject to important limitations. As I discuss below, the mediation between the exclusive rights of copyright holders and consumers' rights in commercial copies of copyright works can be achieved through two limitations: one driven by the purpose of the consumers' uses and the other by the effect the uses may have on the commercial exploitation of the copyright works.¹⁶⁴

¹⁶⁰ See the discussion in Chapter 5 Part II and Part III.

¹⁶¹ See the discussion in Chapter 7 Part III B.

¹⁶² See Aaron Perzanowski & Jason Schultz, "Digital Exhaustion" (2011) 58 UCLA L. Rev. 889, in particular at 913ff, who rely on earlier copyright case law that recognized lawful copy owners with privileges: e.g., rights of repair and renewal, adaptation and modification, display and performance to argue in favour of a copyright exhaustion doctrine to be applied to digital copies of copyright works. By contrast, the principle of exhaustion or the first sale doctrine applies as a limitation to copyright holders' exclusive distribution right only: see the discussion in Chapter 3 Part II F.

¹⁶³ *Ibid* at 943, where the authors summarize some of the effects of applying a broader copyright exhaustion doctrine as follows: "Copy ownership offers a much more intuitive basis for embracing incidental copying by consumers than either the fickle permission of copyright holders or the four fair use factors. The exhaustion principle teaches that the ability to make personal use of a copy is implicit in its purchase. For digital works, use and copying are deeply intertwined. Owners of lawful copies are best positioned to assert a privilege to reproduce copies in the course of personal use."

¹⁶⁴ See the discussion in Part IV B (iv) and Part IV C of this chapter.

The personal property nature of commercial copies of copyright works needs be secured and made explicit in the *CCA*.¹⁶⁵ While explicit statutory reference to the personal property rights of copy owners has not stopped copyright expansionism in other jurisdictions,¹⁶⁶ a broader and positive articulation attesting to the existence of personal property rights, coupled with an articulation of the powers and privileges that personal property entails, may do so in the future.¹⁶⁷

(iii) Purposive approach v. act-based approach

Copyright consumers' rights to commercial copies of copyright works should extend to innumerable acts not subject to surveillance or policing, so long as they are performed for personal non-commercial purposes. The proposal is based on the above analysis of the personal property nature and theoretical justifications of copy ownership, and how to better achieve the instrumental goals of copyright.¹⁶⁸ The proposal also borrows from consumer protection law definitions of consumers and consumer transactions in Canada and worldwide.¹⁶⁹ Like any definitions, the demarcation between consumers and non-consumers is not immune to inadequacies and to some arbitrariness in how the line is drawn between the two.¹⁷⁰ It leaves other copyright users behind, who may have equally compelling reasons to benefit from users' rights that are more clearly demarcated.¹⁷¹ For example, use of copyright works can be made in a business non-personal purposes environment without competing with the commercial exploitation of the works by copyright holders. By resorting to the criteria that define consumers in consumer protection law, to broaden the scope of permitted uses of copyright works in the *CCA*, serves the double function of providing an established "personal purpose sphere," as well as ensuring a consistent identity treatment of consumers by the law. It is also legitimized by a preoccupation that is shared with consumer protection law, i.e., to remedy the possible asymmetries that subsist between consumers and copyright holders.¹⁷²

¹⁶⁵ See the discussion below on the shape that this statutory right should take in Part IV C of this chapter.

¹⁶⁶ For example the US and France copyright acts refer explicitly to the personal property nature of commercial copies of copyright works: see the discussion in Chapter 6 Part II A.

¹⁶⁷ See the discussion below on the shape that this statutory right should take in Part IV C of this chapter.

¹⁶⁸ See the discussion in Chapter 6 Part II and Part III.

¹⁶⁹ See the discussion on how copyright consumers are defined within the larger group of copyright users in Chapter 2 Part IV.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² See the discussion on the theoretical justifications of consumer protection law in Chapter 10.

Confirming copyright consumers' rights within a sphere of personal purposes is a simple concept that is familiar to consumers and to which they can easily relate.¹⁷³ In the context of copyright works, the distinction between personal uses and commercial uses would likely be perceived by most consumers as the just division to distinguish copyright infringement from non-infringement, even though this is not how the *CCA* is presently structured.¹⁷⁴ The distinction is consistent with the main characteristics and justifications of the existence of (personal) property, i.e., the normative status of all ownership freedoms and the *prima facie* open-ended powers and privileges that provide self-seekingness.¹⁷⁵ On that basis, we ought not to be too regarding and discriminating about the acts that are performed, so long as they fall within the personal purpose sphere.¹⁷⁶ The personal purpose sphere transcends the consumptive v. transformative use dichotomy that is prevalent in the copyright user literature.¹⁷⁷ The distinction between consumptive and transformative uses (triggered in part by the different authorizations required with respect to acts to be performed on the work) underestimates the equally important function of "passive" uses of copyright works within the purpose and framework of copyright law.¹⁷⁸ The personal purpose sphere limitation, coupled with the other limitation of permitted uses that is based on the effects that the use may have on the commercial exploitation of the copyright work eliminates the need for the consumptive v. transformative use distinction.¹⁷⁹

The personal purpose sphere brings copyright into the information age by focusing on the purpose of the use rather than on the traditional "acts performed with the work" approach to copyright. In that sense it is similar to the fair dealing provisions¹⁸⁰ and yet distinct in that it provides a broader sphere of use that is reserved for the specific group of consumers among the vast population of copyright users.¹⁸¹ The personal purpose sphere resembles the elements of the four new user provisions that

¹⁷³ See the discussion in Chapter 2 Part IV.

¹⁷⁴ *Ibid.*

¹⁷⁵ See the discussion on the main characteristics of property and ownership in Chapter 4 Part II and on their application to commercial copies of copyright works in Chapter 6 Part II B, in particular (iii).

¹⁷⁶ Litman, "Readers' copyright," *supra* note 69 at 350.

¹⁷⁷ On the distinction between transformative and consumptive uses in copyright law, see the discussion in Chapter 2 Part V.

¹⁷⁸ More particularly, see the discussion in Chapter 2 Part V and in Chapter 6 Part III B. See also Litman, "Readers' Copyright", *supra* note 74 at 350. who recommends a similar approach that does not make "camps" between types of use that are performed within the personal sphere.

¹⁷⁹ See the discussion in Part IV B (iv) of this chapter.

¹⁸⁰ See the discussion on fair dealing in Chapter 3 Part II C.

¹⁸¹ Regarding the broader sphere of uses or acts reserved to copyright holders with respect to their works, this is the approach of *CCA*, *supra* note 3 s 29.21 This is the approach that is proposed by Bill C-11, clause

focus on the purpose of the use as exceptions to copyright infringement, but is distinct in that it does not target specific acts exclusively reserved to copyright holders.¹⁸² A focus on the exact number of copies or other acts performed for personal purposes is becoming anachronistic in the digital environment. Consumers reasonably expect that they should have the right to make copies for convenience for their own personal purposes. Parliament acknowledged this reality to some extent with the introduction of the four new user provisions in the *CCA*.¹⁸³ What remains relevant within the framework of copyright is the purpose for which the use is made and its effect on the commercial exploitation of the copyright work, which I explore next.

(iv) Non-competition with copyright holders' commercial exploitation

While the personal purpose sphere limitation on the rights of copyright consumers evacuates commercial uses and exploitations of copyright works, the proper mediation between the competing rights of consumers and copyright holders dictates that consumers' uses should not compete with the commercial exploitation of the copyright works.¹⁸⁴ Otherwise, consumers would be exercising their copy ownership powers and privileges beyond their property-specific justice reasons.¹⁸⁵ The limitation on consumers' rights to perform acts that do not compete with the commercial exploitation of the copyright work is inspired in part by Litman's general recommendation that copyright should be redesigned as an exclusive dissemination right for commercial exploitation.¹⁸⁶

22 which would introduce a new section 29.21 which in this case is limited to non-commercial user-generated content.”

¹⁸² See the discussion in Chapter 3 Part II D. Except for the non-commercial user-generated content exception to copyright infringement, the four new user provisions authorize specific acts exclusively reserved to copyright holders (e.g. the exclusive right to reproduce) coupled with specific purposes.

¹⁸³ *Ibid.*

¹⁸⁴ One of the recently introduced user provision in the *CCA*, *supra* note 3, s 29.21, “Non-Commercial User-generated Content” contains a similar concept. The use of the copyright work is permitted as long as it “does not have a substantial adverse effect, financial or otherwise on the exploitation or potential exploitation of the existing work or other subject matter-or copy of it-or on an existing or potential market for it, including the new work or other subject matter is not a substitute for the existing one.” David Vaver, “Harmless Copying” (2012) 25 I.P.J. 19 at 27, proposes that copyright infringement should be redefined to include the concept of substantial harm to copyright holders that could include acts performed on copyright works that compete with copyright holders' exploitation of the work.

¹⁸⁵ See James W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996) at 168. See the discussion on the limits of the powers and privileges of copy ownership in accordance with the competing interests of copyright holders in Chapter 7 Part III B.

¹⁸⁶ Litman, “Digital Copyright”, *supra* note 134 at Chapter 12.

There are several uses that are made within the personal sphere of consumers and yet can compete with the commercial exploitation of the copyright works. File sharing is one example that comes to mind. Uploading the entire copy of an e-book or musical recording on a personal webpage without the authorization of the copyright holder is another example of an act performed in the personal sphere for non-commercial purposes that may still interfere with the economic rights or commercial exploitation of the work.

Conversely, there are several uses that are made in a business non-personal purpose environment that do not compete with the commercial exploitation of copyright works, but in order to maintain consistency with consumers as currently defined under consumer protection laws these uses would not be permitted under the personal purpose right.¹⁸⁷

In setting adequate limitations on the *prima facie* open-ended powers and privileges to ownership of commercial copies of copyright works, the word “competition” is preferred to “interference” with copyright holders’ commercial exploitation of the work. By the word “competition” I want to emphasize that not just any interference or positive benefit of the use of the copyright work should allow copyright holders to limit consumers’ use. The realization that some acts reserved to copyright holders should be permitted for specific purposes without triggering compensation for copyright holders is reflected to some extent by the four new user provisions that were recently introduced in the *CCA*.¹⁸⁸ As lawful personal owners, consumers are entitled to the enjoyment of the copy in accordance with the guidance principles enumerated here. As I argued in Chapter 7, it is the consequence of copy ownership acting as a property-limitation rule of copyright.¹⁸⁹

¹⁸⁷ See the discussion in Part IV B (iv).

¹⁸⁸ *CCMA*, *supra* note 4, amending the *CCA*, *supra* note 3, by adding ss 29.21-29.24. See also the discussion on the four new user provisions in Chapter 3 Part II D. See also Hargreaves, *supra* note 88 at 48 (para 5.28) where the author recommends the introduction of a limited right to make copies for private purposes without a remuneration scheme to copyright holders, pointing that there was no evidence that such uses were harmful to copyright holders. The recommendation of a limited right to make copies for format shifting and private purposes, without a levy to compensate copyright holders was also made in the Gowers report: Gowers, *supra* note 152 at 63- para 4.75 and 4.76. Other commentators argue that the right to make private copies be maintained with a levy for copyright holders. See for example Christopher Geiger, “The answer to the machine should not be the machine: safeguarding the private copy exception in the digital environment” (2009) 30 *European Intellectual Property Review* 121, at 128-129

¹⁸⁹ See the discussion in Chapter 7 Part III.

(v) Promoting markets for lawful commercial copies of copyright works

The affirmation of a personal purpose right only applies with respect to lawfully acquired commercial copies of copyright works. Without the requirement of lawful acquisition, the structure that will enable a more effective and legitimate mediation between the competing property rights of copyright holders and copy owners starts to crumble. How can consumers otherwise justify ownership rights as the basis of the exercise of their autonomy and freedom? Commentators have raised concerns about the onus that the requirement of lawful copies places on consumers.¹⁹⁰ The requirement of lawfully acquired copies for the application of the personal purpose right seems inevitable, and just. The requirement of lawfully acquired copies is the means to legally ground and legitimize the personal purpose right that consumers have.¹⁹¹ The requirement also strengthens the legal structure of lent copies of copies made to friends and family as a result of the exercise of consumers' personal purpose right. The reproductions made from lawful copies of copyright works would not benefit from the same personal purpose right.¹⁹²

The five guiding principles toward substantiating of consumers' rights to commercial copies of copyright works mediate between competing property rights by balancing the justifications for copy ownership with the justifications for copyright. The principles lead to various forms of legal implementation, one of which I explore next.

B. A proposal: consumers' right to use for personal purposes

The path that I propose here to solidify copyright consumers' rights is a copyright law statutory provision enunciating general principles that would implement the guiding principles as founded upon

¹⁹⁰ For example, see European Parliament, DG for Internal Policies, Policies Department: Citizens' Rights and Constitutional Affairs, "The Relations Between Copyright Law And Consumers' Rights From A European Perspective" by Séverine Dusollier (2010) at 20 (para 2.1.4) where the author summarizes the difficulty posed by the requirements of lawful origin of the copy.

¹⁹¹ See for example two of the newly introduced provisions in the *CCA*, *supra* note 3: s. 29.21 "non-commercial user-generated content" and s 29.22 "Reproduction for private purposes", two exceptions to copyright infringements which refer respectively to a reasonable ground to believe that the existing work was not infringing copyright and that the permissible use is subject to the copy not being an infringing copy.

¹⁹² Copies made as a result of the personal purpose right that I propose here should be treated as lent copies with the unlimited right to read, play, listen but for which no acts exclusively reserved to copyright holders can be performed without the authorization of copyright holders.

the building blocks that I presented above in this chapter.¹⁹³ The statutory provision would confirm that consumers who lawfully acquire commercial copies of copyright works have the right to use the copies for personal non-commercial purposes in a manner that does not compete with copyright holders' commercial exploitation of the works and that respects the moral rights of authors.¹⁹⁴ Reference to personal and non-commercial purposes is somewhat tautological but consistent with the definition of consumers and consumer transactions.¹⁹⁵ Reference to *personal* as opposed to *private purposes* is also more consistent with the public performance (or communication to the public) elements that may be involved in consumers' personal purpose rights.¹⁹⁶ As I argued above in this chapter, the personal purpose right would be mandatory in consumer transactions.¹⁹⁷ Likewise, the onus would be on copyright holders to ensure that copyright works commercialized with technological protection measures comply with the personal purpose right.¹⁹⁸

The personal purpose right would depart significantly from existing statutory clauses that seek to address the personal property rights of copy owners, as is the case in the US and in France,¹⁹⁹ by

¹⁹³ See the discussion in Part III and Part IV A and B of this chapter.

¹⁹⁴ Similar proposals have been made to address users' rights within copyright law. See for example Thomas Riis & Jens Schovsbo, "Users' rights: reconstructing copyright policy on utilitarian grounds" (2007) 29 E.I.P.R. 1 at 2-3, where the authors recommend the introduction of a user right "Users of works eligible for protection under copyright law have the right to reproduce and communicate to the public copyrighted works provided that this activity does not unreasonably prejudice the legitimate interests of the rightholders [...] the scope of the right would be evaluate by function of the type of use: democratic use, information use, transformative use, personal use, and reasonable commercial use. In addition, the authors would redefine copyright by narrowing the scope of the exclusive rights "to the extent that such rights enhance social and economic welfare, creativity and technological innovation and promote cultural development."

¹⁹⁵ See the discussion on how consumers' statutory law define consumers and on the justifications for adopting these definitions in the context of defining consumers' rights to commercial copies of copyright works in Chapter 2 Part IV.

¹⁹⁶ See the discussion in Chapter 2 Part IV on the possible distinctions between "private purposes" and "non-commercial purposes" as such concepts are presently utilized in the *CCA*, *supra* note 3.

¹⁹⁷ See the discussion in Part III B of this Chapter.

¹⁹⁸ *Ibid.*

¹⁹⁹ For example in the US, 17 USC § 202 provides: "Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyright work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object." In France, art L.111-3 CPI, makes the distinction between ownership of copyright as intangible property and ownership in the material object that embeds the copyright work as follows: "La propriété incorporelle définie par l'article L.111-1 est indépendante de la propriété de l'objet matériel..... Ces droits subsistent en la personne de l'auteur ou de ses ayants droit qui, pourtant, ne pourront exiger du propriétaire de l'objet matériel la mise à leur disposition de cet objet pour l'exercice desdits droits."

broadening consumers' permitted scope of use by allowing the performance of acts that are reserved to copyright holders on the basis of their lawful ownership of commercial copies of copyright works, the personal purpose of the uses, and the non-competition with copyright holders' commercial exploitation of the works. The general personal purpose right that I propose here, as delimited by the non-competition with copyright holders' commercial exploitation of copyright works, and respect of moral rights, enables consumers' rights to adapt to the exigencies of new circumstances and environments.

The personal purpose right would allow consumers to perform all acts reserved to copyright holders as long as those acts comply with the personal non-commercial purpose and do not compete with copyright holders' commercial exploitation of copyright works. In that sense, it resembles the newly introduced non-commercial user-generated content exception to copyright infringement but expands the permitted uses beyond transformative uses of pre-existing works.²⁰⁰ It would overlap with, and yet be broader than, other newly introduced exceptions to copyright infringement.²⁰¹ By contrast to the four new user provisions and other exceptions to copyright infringement, the personal purpose right would explicitly take precedence over any contract or TPM that would limit or constrain its exercise.²⁰² The personal purpose right would co-exist with other exceptions to copyright infringement, including the private copying regime,²⁰³ fair dealing, and non-substantial part provisions of the *CCA*.²⁰⁴ Each of these exceptions to copyright infringement serves distinct functions beyond consumers' enjoyment of commercial copies of copyright works for personal purposes.²⁰⁵

The positive affirmation of the personal property rights of consumers would embed the exhaustion principle or first sale doctrine, i.e., the right to transfer the copy without any duty to account to the copyright holder. The exhaustion or first sale doctrine would apply to commercial copies of copyright

²⁰⁰ *CCA*, *supra* note 3, s 29.21. See the discussion on the non-commercial user-generated content exception to copyright infringement in Chapter 3 Part II D (i).

²⁰¹ For example, *CCA*, *supra* note 3 s 29.22 "reproduction for private purposes" and s 29.24 "backup copies" exceptions to copyright infringement.

²⁰² See the discussion on the uncertainties of the nature of exceptions to copyright infringement that result from the interaction with contracts and TPMs in Chapter 3 Part IV.

²⁰³ The latter is about to become obsolete because of its current narrow scope.

²⁰⁴ The scope of the private copying regime, the fair dealing and the non-substantial part exception are discussed in Chapter 3 Part II.

²⁰⁵ *Ibid.*

works distributed online with no physical supporting media, with some exceptions.²⁰⁶ The normative and legal force of personal property in the copy repatriates this ownership freedom, as well as others that have been gradually taken away by the progressive expansion of copyright.²⁰⁷

The personal purpose right is the articulation of what most consumers do on a daily basis with commercial copies of copyright works, without suspecting that they could ever be performing unlawful acts.²⁰⁸ The recent introduction in the *CCA* of the four new user provisions as exceptions to copyright infringement validates certain consumers' uses of copyright works without requiring compensation for copyright holders in return for those permitted acts.²⁰⁹ The personal purpose right also challenges the general structure of copyright holders' exclusive rights and the general economy of the *CCA*.²¹⁰ The personal purpose right is founded on the reasonable expectations of personal property owners, a fundamental institution of our legal system upon which copyright relies in great part.²¹¹ At the same time, the personal purpose right would take into account the legitimate interests of copyright holders. The personal purpose right would confirm the legitimacy of innumerable acts that are performed on a daily basis by consumers and that are not counter to the main objectives of copyright. It would implement a forgotten part in the digital agenda, the one that also brings copyright consumers into the information age.

C. Further considerations

There are many other considerations on the solidification of consumers' rights to commercial copies of copyright works and their implementation through the statutory provision that I propose here. For instance, any legislative reform needs to comply with Canada's international copyright obligations, in particular, the "three-step test" that sets the conditions that need to be met when national jurisdictions

²⁰⁶ I.e. with the exception of instances where the copyright work is accessed as a service or under a limited term rental arrangement: see the discussion in Chapter 8 Part II B and C, Part III and Part IV.

²⁰⁷ See the discussion in Chapter 5 Part II.

²⁰⁸ See Hargreaves, *supra* note 88 at 49, where the author arrived at a similar conclusion and recommended the introduction of a limited private copying exception that would legalise the acts that most consumers already perform with copies of copyright works on a daily basis.

²⁰⁹ See the discussion in Chapter 3 Part II D.

²¹⁰ Essentially by shifting from an act- based approach to copyright exclusive rights and hence copyright infringement, as reflected in how copyright is defined: *CCA*, *supra* note 3, ss 3,15,18,21,26 to a purpose-based approach to copyright exclusive rights and infringement.

²¹¹ The theoretical justifications of copy ownership of copyright works are discussed in chapter 6.

impose restrictions or exceptions on copyright holders' exclusive rights.²¹² As I discussed in Chapter 3, the vague wording of the three-step test, as contextualized by the objectives pursued by international intellectual property conventions more generally, should give member states of the relevant international intellectual property law treaties the flexibility they need to create the proper level of exceptions and limitations to copyright to meet the needs of their specific domestic exigencies.²¹³ Another consideration around the solidification and ongoing maintenance of copyright consumers' rights is to ensure adequate representation of the interests of consumers in legislative reform processes.²¹⁴

V. The renovations outcome

I end this chapter by looking at three of the outcomes that will result from the solidification of consumers' rights to commercial copies of copyright works and the clarification of the concepts of "tangibility" and "goods". The three outcomes provide an invigorated application of consumer law to commercial transactions of commercial copies of copyright works, a more robust articulation of the copyright holder end-user relationship, and a finer balance within copyright law.

²¹² *Berne Convention for the Protection of Literary and Artistic Works*, 828 U.N.T.S. 221, September 9, 1886; rev. in Berlin November 13, 1908, art. 11, 13, 14; rev. in Rome June 2, 1928, art. 11bis, art 9(2); *Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C*, Apr. 15, 1994, 1869 U.N.T.S. 29, 33 I.L.M. 1197 (1994) [TRIPS], art 13; *WIPO Copyright Treaty*, 20 December 1996, WO033EN, online: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P8_189 [WCT], art 10; *WIPO Performances and Phonograms Treaty*, 20 December 1996, WO034EN, online: http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html [WPPT], art 16. The three-step test is limited to reproduction rights in the case of the *Berne Convention*, *ibid*, and applies to all exclusive rights in the case of *TRIPS*, *WCT* and *WPPT*, *ibid*. See the discussion on Canada's international obligations in Chapter 3 Part V.

²¹³ See the discussion in Chapter 3 Part V.

²¹⁴ In Canada, a vast consultation of the public on copyright reform was initiated by the Government of Canada. See: <http://www.ic.gc.ca/eic/site/008.nsf/eng/home>. On the lack of involvement of the public in intellectual property matters see: Vaver 2011, *supra* note 127 at 680-681; On the dangers of legislative reform capture by powerful interests particularly in the area of copyright, see Hargreaves, *supra* note 88 at 93 (para 10.9ff). On how European copyright consumers are becoming increasingly organized, see : Antonina Bakardjieva Engelbrekt, "Accommodating the interests of the copyright consumer: New institutional dynamics in the wake of the infosoc directive" in Antonina Bakardjieva Engelbrekt, Ulf Bernitz, Bengt Domeij, Annette Kur & Jonas Nordell, eds, *Särtryck ur Festskrift till Marianne Levin* (Norstedts Juridik: 2008) where the author applies institutional choice theory to demonstrate the increased involvement of consumer groups in Europe in the legislative process of copyright and consumer law reforms and before the courts.

A. The reinvigorated function of consumer protection law

As a result of the structural deficiencies of the allocation of rights between copyright holders and consumers in the *CCA*,²¹⁵ and of the narrow interpretation of tangibility to define goods,²¹⁶ consumer protection law cannot intervene effectively to attenuate the detrimental effects of various forms of asymmetry between producers, suppliers, and consumers.²¹⁷ The substantiating of copyright consumers' rights as proposed in this chapter, as well as the confirmation that exceptions to copyright infringement are rights or, at a minimum, that they are mandatory,²¹⁸ will enable consumer law to play a greater role in protecting consumers of information products against commercial practices that deviate from the renovated structure of copyright. Invigorating copyright consumers' rights through changes in the *CCA* will modify the substantive bases that help determine "consumers' reasonable expectations" in the application of consumer law implied obligations.²¹⁹ The statutory clarification of copyright consumers' rights within copyright law, together with an expansion of our understanding of tangibility and goods, will remove conceptual obstacles for the application of implied obligations of quality, fitness for purpose, and quiet possession that are presently out of reach for copyright consumers. The scope of permitted use is an element of the quality, fitness for use, and quiet possession of a product to the same extent that the quality of the image of a film or of the sound recording is.²²⁰ It should be subject to the same scrutiny and remedies as any other goods or services. Similarly, any standard consumer commercial transaction that goes fundamentally against the allocation of rights between consumers and copyright holders as per the renovations proposed here may be seen as unfair commercial practice and give rise to specific remedies for consumers.²²¹

²¹⁵ See the discussion in Part II A and B of this chapter summarizing the main deficiencies underscored in the First Part and in the Second Part of my thesis.

²¹⁶ See the discussion in Chapter 8 and the recommendations made in Part III C of this chapter.

²¹⁷ I summarize the rippling effects of deficiencies of the *CCA*, *supra* note 3, on its treatment of copyright consumers on the application of consumer protection law in Part II C of this chapter.

²¹⁸ See the discussion in Part III and Part IV of this chapter.

²¹⁹ See the discussion in Chapter 9 Part II.

²²⁰ See the arguments that I develop under four scenarios for the application of consumer law obligations to the scope of permitted uses of commercial copies of copyright works in Chapter 11.

²²¹ For example see Lucie Guibault & Natali Helberger, "Copyright law and Consumer Protection, study carried out for the European Consumer Law Group" (2005) ECLG/035/05 at 23 where the authors discuss the application of the "Presumption of unfairness of restrictive license clause" and use the example of standard consumer contracts derogating from copyright act regimes of private use. They refer to a concept borrowed from German law on unfair contract terms, that share similarities with the doctrine of unconscionability in the common law, ie. Article 307(2) of the German Civil Code which specifies that (from the translation given by the authors) 'in doubt, an unreasonable disadvantage is to be presumed, when

Overall, the various mechanisms within consumer protection law that bridle freedom of contract in order to protect consumers against the detrimental effects of asymmetries will be applied more effectively to support the renewed balance of rights between copyright holders and consumers.²²²

B. A more robust articulation of the copyright holder–end-user relationship and a finer balance within copyright law

The current framework of the *CCA* does not provide all the necessary tools to actualize the balance between copyright holders, authors, consumers, and other users, an objective that has increasingly become central to Canadian copyright law and policy.²²³ Due to their uncertain mandatory nature, the so-called users' rights cannot fully counterweigh copyright holders' exclusive rights that they are entrusted with. The exploitation of copyright in the copyright holder–end-user relationship, where the need to balance competing interests is increasingly in demand, is poorly articulated.

Solidifying copyright consumers' rights in the manner proposed in this chapter, as well as confirming that exceptions to copyright infringement are rights or, at a minimum, mandatory,²²⁴ bring more substantiality to the concept of balance in Canadian copyright law. The articulation of copyright consumers' rights addresses the loose ends of a poorly articulated copyright holders–end-user relationship in the *CCA* that contributes to the declared balance objectives of the *CCA*. As a result, the copyright framework will be reconfigured closer to its declared instrumental objectives to encourage and reward the creation and dissemination of works and reduce the counterproductive effects of the progressive expansion of copyright holders' exclusive rights.

A more substantive balance within copyright law, as opposed to broad aspiration goals, will make copyright more credible and coherent within the broader web of laws on which it relies and with which it interacts. It will bring changes that more fully embrace the new exigencies of the digital

a term is incompatible with the rationale behind the legal provision from which it differs; or when a term restricts the essential rights or obligations that flow from the nature of the contract to such an extent as to endanger the achievement of the contract's purpose.'

²²² Statutory consumer protection law provisions constrain freedom of contract either through mandatory obligations or by attenuating the effects of contract obligations in favour of consumers. See the discussion in Chapter 8 Part I.

²²³ See the discussion on the balance of competing interests as a central objective in the *CCA*, *supra* note 3 in Chapter 2 Part II.

²²⁴ See the discussion in section in Part III B of this chapter.

environment, this time with other participants in mind rather than just copyright holders. At the same time, a safe, flexible, and evolving area of lawful permitted use of copyright works for consumers may also encourage more compliance with copyright holders' exclusive rights.²²⁵

VI. Conclusion

In this chapter, I presented the five building blocks that my research work identified as important to adequately address consumers' rights to commercial copies of copyright works. The building blocks can be achieved through legislative reform or through judicial interpretation, as the context dictates. With the strength of these foundations in mind, I enumerated five guiding principles for solidifying consumers' rights to commercial copies of copyright works. I have given one application of the five guiding principles, that is, the recommendation of a statutory provision confirming a broad personal purpose right to consumers acquiring lawful copies of copyright works. In addition to solidifying copyright consumers' rights, the expected outcome of these proposals and recommendations include a reinvigorated function of consumer protection law, a more robust articulation of the copyright holder–end-user relationship and a finer balance within copyright law.

²²⁵ As noted in Gowers, *supra* note 152 at 40 (para 3.29): “The fact that the letter of the law is rarely enforced only adds to the public sense of illegitimacy surrounding copyright law. [...] If uses such as transferring music from CDs to an MP3 player for personal use are seen to be illegal, it becomes more difficult to justify sanctions against copyright infringement that genuinely cost industry sales, such as from freely downloading music and films using the Internet.”

Chapter 13

Conclusion

The purpose of my thesis was to evaluate the copyright consumers' bargain by defining consumers' rights to commercial copies of copyright works legally and normatively. The legitimacy and subsistence of copyright increasingly depend on the ability of our laws and policies to account even-handedly for the interests of consumers and other users alongside the interests of copyright holders and authors. I argued that property law and theory, in particular the concept of property limitations, offer tools to adequately define and mediate between the competing rights and interests of copyright holders and consumers in copyright works. I also argued that the *prima facie* normative force of ownership freedoms and the instrumental justifications of copyright to incent the creation and dissemination of copyright works, justify a broader scope of consumers' ownership rights in commercial copies of copyright works. Properly defining the scope of ownership rights in commercial copies of copyright works serves as the baseline to define copyright consumers' rights in a broad range of other legal relationships involving copyright works. I argued that the scope of consumers' and other users' rights to commercial copies of copyright works needs to be clarified in Canada's *Copyright Act* [CCA]¹ and similar statutes in other jurisdictions. Only once the proper scope of consumers' rights is established by the CCA can consumer law more fully play its remedial function to support consumers' claims against restrictive uses of copyright works.

The evolving technological environment in which copyright works are made available to consumers forces us to constantly reconsider the legitimate scope of ownership and the *prima facie* open-ended powers and privileges of copyright holders, consumers, and other users. Approaching the copyright consumers' bargain through the lens of property, copyright, contract, consumer law and theory exposed the copyright consumers' bargain paradox. The constant evolution of technology empowers consumers to interact with commercial copies of copyright works in unprecedented ways, as well as copyright holders' ability to control every single use consumers make of copyright works. Through the

¹ RSC 1985, c. C-42.

interaction between the law and how copyright holders commercialize their works, consumers may not be getting the bargain that they can reasonably expect: they may not own the copies that they lawfully purchased and be able to transfer the copies to another party, and may be constrained in their ability to exercise the so-called user rights that the *CCA* or similar statutes in other jurisdictions confer by default.² With respect to the exercise of the *CCA*'s exceptions to copyright infringement, copyright consumers may end up in a worse position than users who access copies of copyright works without a commercial transaction.

As a starting point, copyright consumers' rights to commercial copies of copyright works emerge as a complex form of personal property, the rights in which are determined in great part by the so-called users' rights that the *CCA* or similar statutes in other jurisdictions confer, and by the commercial transactions through which consumers access copyright works. I argued that a clearer understanding in law of tangibility and intangibility, of goods and services, and of sales and licences is essential for the adequate treatment of copyright consumers' rights, and to properly support copyright consumers' claims in property, sale of goods, and consumer protection law. The research that I conducted enabled me to expose many uncertainties and defects with respect to copyright consumers' rights to commercial copies of copyright works. The framework that I developed in my thesis led to guiding principles and recommendations to solidify copyright consumers and other users' rights.

The research that I conducted and the analysis that I presented here point to the double standard that often applies to copyright consumers with respect to the concepts of property, ownership, tangibility, and freedom of contract, and with respect to the promotion of autonomy, innovation, creativity, and other core values of modern democratic societies. Each time, I questioned the legitimacy of the different weight that is given to the application of core principles of law and fundamental values by bringing forward the more neglected

² See David Vaver, "Intellectual property: still a "bargain"?" (2012) 34 E.I.P.R. 579, in particular at 584-586, where the author asks whether intellectual property generally is a good bargain as between right holders and the public.

interests of copyright consumers in the regulation of commercial copies of copyright works. The arguments that I developed throughout my thesis sought to provide the tools to better account for the copyright consumers' interests in the digital environment, through mediating frameworks that acknowledge conflicting values and interests in the copyright house.

In the First Part of my thesis, I presented the current landscape of copyright consumers. I described that through recent legislative reform, the *CCA* acknowledges the interests of copyright users and consumers more than it ever did in the past. However, the framework and purpose of the *CCA* remains focused on protecting the rights and interests of copyright holders. The predominant act-based approach, as opposed to the purpose-based approach, to determine copyright infringement still poses many challenges for consumers and other users in the digital environment. I argued that copyright consumers who do not produce creative outputs from their consumption of copyright works deserve as much attention as the consumer-authors, on the basis that seemingly more passive uses of copyright works also form part of the innovation and creative processes that the *CCA* seeks to promote. I analyzed the nature and scope of exceptions to copyright infringement in the *CCA* – the so-called users' rights – and concluded that they were either ill-suited to the needs of copyright consumers or too narrowly defined. I argued that their nature as rights was precarious in light of the interaction of exceptions to copyright infringement with non-negotiated end-user agreements and the application of technological protection measures, and in light of their uncertain mandatory nature. I concluded that copyright consumers' current landscape as sketched by the *CCA* leads to a complex maze of limited permitted acts authorized by Parliament, that are heavily subject to the will of copyright holders through non-negotiated standard end-user agreements and the application of TPMs.

In the Second Part of my thesis, I applied concepts of property law and theory to better understand the nature of commercial copies of copyright works, with a particular focus on ownership, property limitations, and the *numerus clausus* principle. I concluded that copyright embeds two distinct limited proprietary interests. The first one is an ownership interest that is the object of commercial exploitation: it does not confer ownership in the work, but in *the bundle of*

exclusive rights as they pertain to the work as materialized. The second one is a limited non-ownership proprietary interest in the embodiments of copyright holders' works. I argued that the progressive expansion of copyright might be attributable in part to a misunderstanding of the limited proprietary interests of copyright, including the misconception that copyright holders can own their work. The proper application of the property attributes to copyright reveals the constrained scope of copyright, rather than justifying its expansion. For their part, commercial copies of copyright works are an increasingly contested form of personal property. The non-ownership proprietary interest of copyright holders to *interfere* with commercial copies of copyright works continues to expand, transfiguring commercial copies of copyright works into an increasingly peculiar form of personal property. When the ability to transfer the rights in commercial copies of copyright works is constrained, copies of copyright works may no longer be considered as traditional forms of personal property. I concluded that copy owners might be getting less and less of what they should reasonably expect through their juridical relation with the resource that they lawfully acquired. I argued that the proper scope of rights to commercial copies of copyright works needs to be considered on the basis of the *prima facie* normative force of ownership freedoms, the specific role that copy ownership plays in the instrumental design of copyright, and on the basis of greater transaction efficiency between copyright holders and consumers. I argued that consumer owners of commercial copies of copyright works had a specific relationship with copyright holders that created a property-limitation rule on the exclusive rights of copyright holders. The property-limitation rule can intervene to secure copyright consumers' rights in the copies they own, when the scope of the exclusive rights of copyright holders are unclear, to reinforce the application of the exhaustion or first sale doctrine and to assert the open-ended privileges and powers to play, view, listen, and read. At a normative level, to posit copy ownership as a property-limitation rule on copyright holders' exclusive rights justifies setting boundaries to the expansionist tendencies of copyright holders' exclusive rights just as much as copyright can be invoked as a property-limitation rule on the ownership interest in commercial copies of copyright works. I concluded the Third Part of my thesis by arguing that the *numerus clausus* principle as a norm of judicial self-governance can act as a mediating tool to calibrate copyright holders' commercial exploitation of their works by constraining their ability to modify the scope of rights and interests of consumers who lawfully access commercial copies of copyright works.

In the Third Part of my thesis, I looked at how consumer law and theory can help further assert consumers' rights to commercial copies of copyright works. First, I observed that for sale of goods and consumer law to perform their proper role, we need to resolve the uncertainty about the nature of commercial copies of copyright works as goods, particularly when the copies are not embedded in a physical object. I argued that a proper understanding of the concept of tangibility, of what distinguishes goods from services, and the differences between sales and licences is essential to achieve that goal. I demonstrated how clarifying the distinctions between these concepts in law can also resolve conflicts on the application of the exhaustion or first sale doctrine in copyright law, as well as help determine the exclusive rights of copyright holders that are implicated in a commercial transaction. Second, I argued that the function of the relevant consumer law obligations that can help consumers assert their claims against restrictive uses of commercial copies of copyright works relies in part on consumers' reasonable expectations regarding their proprietary interests in commercial copies of copyright works. I applied consumer law obligations to assert claims against restrictive uses of commercial copies of copyright works in four distinct scenarios. I concluded that the remedial function of consumer law to support consumers' reasonable expectations (of quality, fitness for purpose, quiet possession), to ensure that they are adequately informed, and to protect them against unfair commercial practices, are limited to the extent that the restrictions of uses are legitimized or unclear as a result of the property framework designed by copyright.

In the Fourth Part of my thesis, I made proposals to solidify consumers' rights to commercial copies of copyright works as justified by the *prima facie* normative force of ownership freedoms and the instrumental justifications of copyright to incent creativity and innovation and the dissemination of copyright works. Beyond ensuring the adequate treatment of copyright consumers' interests, the underlying objective is to make copyright law more coherent in order to preserve its legitimacy and to improve the overall regulation of information products. The scope of consumers' rights to commercial copies of copyright works needs to be clarified through the instrument that confers exclusive rights to copyright holders, i.e., the *CCA* or similar statutes in other jurisdictions. Among other things, the proposals include the recognition that exceptions to

copyright infringement are mandatory rights or, at a minimum, that they are mandatory exceptions in non-negotiated standard end-user agreements. The guiding principles of integrating the interests of consumers and other users within the copyright house include the formal recognition of the personal property *prima facie* open-ended privileges and powers of ownership in commercial copies of copyright works, a purposive approach to acts permitted without the authorization of copyright holders that should not compete with the commercial exploitation of copyright works, and should respect the moral rights of authors. In parallel, there needs to be a renewed understanding of the concepts of tangibility and intangibility in sale of goods, consumer and copyright law, as well as a more refined understanding of the distinction between goods and services and between sales and licences. Consumer law can play its remedial role of supporting consumers' reasonable expectations, of supporting their interests to be adequately informed, and of protecting them against unfair commercial practices only to the extent that consumers' rights to commercial copies are clarified at the foundation level of property and copyright.

As the debate continues about the proper scope of rights that copyright should confer on copyright holders, the arguments that I developed throughout my thesis emphasized the stakes of locating copyright consumers in the copyright house and of understanding the nature of their rights among the larger group of users. I offered tools on how to better address conflicting values and interests in a constantly evolving technological environment. Solidifying the rights of copyright consumers will not only benefit consumers, it will also benefit copyright holders, other users, and various business intermediaries who facilitate access to copyright works. It may also increase the confidence that the public has in our laws.

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